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THE
EGYPTIAN LAW
OF
OBLIGATIONS.

*A COMPARATIVE STUDY WITH SPECIAL REFERENCE
TO THE FRENCH AND THE ENGLISH LAW.*

BY

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with a Commentary," &c.

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PREFACE.

IN writing this book, which I hope to follow up by a volume on the law of responsibility or "torts," I have had in view two objects: the first to provide a commentary in English on the Egyptian Native Code so far as the subject of obligations is concerned, and the second to compare the Egyptian Code with more recent European codes, with the civil law of the Province of Quebec, and also with the English law. But the articles upon obligations in the Egyptian Code are merely an abridgment of those in the French Code with modifications in details, and the Egyptian Courts, unless they have already a settled jurisprudence of their own, naturally turn for guidance to the French commentators and to the decisions of the French Courts, more particularly to those of the *Cour de Cassation*.

Any commentary on the Egyptian Code must, therefore, be, in effect, a commentary on the French Code indicating the points where the Egyptian legislator has introduced modifications. This encourages me to hope that this book may be found useful by English and American lawyers who are interested in the French law.

Until recently few lawyers who practised the common law took much interest in the modern civil law, and not many civilians were at the same time students of the common law of England.

Upon both sides there are gratifying signs of change in this respect. But it must be admitted that many difficulties confront the French lawyer who

wishes to compare the English law with his own. There are no English Codes for him to turn to. He cannot be expected to find his way in the mazes of the English reports, even if he has access to them, which is rarely the case. And in spite of the number of admirable text-books upon special subjects, there is not any good and short compendium of the English private law which quite fills the place of such a work on the French law as, for example, M. Planiol's *Traité Élémentaire de Droit Civil*.

The brief notes on English law in this work, and the references given in them, will, I hope, be of some service in this regard.

In dealing with some subjects, more particularly the formation of consent, the vices of consent, and unlawful contracts, these comparisons are fairly systematic. In other parts of the work, such as the chapters on the various kinds of obligations, and on the modes of extinction of obligations, this comparison presents less interest.

In the notes on English law there are many references to familiar English text-books. This does not require any apology when it is remembered that the summaries are meant for foreign students.

As regards French authorities it is, perhaps, well to explain that in order to avoid giving long lists of writers and of decisions on both sides of a question, I have often contented myself with citing the place in Dalloz, *Nouveau Code Civil Annoté*, where such lists may be found.

I am indebted to my wife for much help in correcting the proof-sheets.

SULTANIA SCHOOL OF LAW,
CAIRO,

May 1st, 1920.

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ALPHABETICAL LIST OF MAXIMS AND PHRASES.

*. * Latin is not taught in the *curriculum* of the Egyptian Government schools.

MAXIMS.	MEANING.
A fortiori	with stronger reason.
Ab initio	from the beginning.
Actio stricti juris	action of the strict law.
Actio bonae fidei	action of good faith.
Actus conditionalis defecta conditione nihil est	a conditional promise is null if the condition fails.
Ad conservandum vel perpetuendam obligationem non . . . ad augendam	for the purpose of preserving or keeping up the obligation, not for the purpose of increasing it.
Adeoque omnia perinde revocantur restauranturque acsi neque alienatio neque liberatio facta, aut quid aliud gestum esset	and accordingly everything is to be brought back and restored as if there had been no alienation or discharge and as if nothing else had been effected.
Ad hoc	for this object.
Adjectus solutionis gratia	person brought in to receive payment.
Ad nauseam	to the point of producing disgust.
Ad probationem	for proof.
Alteri stipulari nemo potest	nobody can stipulate for another.
Anatocisme	interest upon interest.
Animo donandi	with the intention of making a gift.
Animo vicino nocendi	with intent to injure one's neighbour.
Causa donandi	the cause of the donation.
Certat de damno evitando	he fights to avoid a loss.
Certat de lucro captando	he fights to make a gain.
Cognitio extra ordinem	an enquiry by special process of law.
Condictio causa data causa non secuta	An action for repetition of something paid on the ground that the act or event in view of which the payment was made did not take place.
Condictio indebiti	action for repetition of something paid which is not due.
Condictio ob turpem vel injustam causam	action to recover something paid for an immoral or unlawful cause.
Condictio sine causa	action to recover something paid without a cause.
Confirmatio nil dat novi	confirmation or ratification does not create anything new.
Consensus	consent.
Consensus in idem	agreement as to the same thing.
Consilium fraudis et eventus damni	fraudulent intention and resulting damage.

MAXIMS.	MEANING.
<i>Contra non valentem agere non currit praescriptio</i>	prescription does not run against a person incapable of suing.
<i>Culpa lata dolo acquireratur</i>	gross negligence is assimilated to intentional wrongdoing.
<i>Cum certum est an et quantum debeat</i>	when it is certain whether there is a debt and how much is due.
<i>Cur debetur?</i>	why is it due?
<i>Damnum emergens</i>	loss which results.
<i>De proxenetico, quod et sordidum, solent praesides cognoscere</i>	as regards marriage-brokerage, which is a sordid business, the governors are competent to decide.
<i>Denier à Dieu</i>	God's penny or earnest money.
<i>Dies a quo</i>	date from which.
<i>Dies ad quem</i>	date to which.
<i>Dies interpellat pro homine</i>	the expiration of the time is itself equivalent to demand.
<i>Do ut facias</i>	I give that you may do something.
<i>Dolus semper praestatur</i>	one is always liable for intentional wrongdoing.
<i>Donatio sub modo</i>	donation subject to a charge or condition.
<i>Emptio rei speratae</i>	sale of a thing expected.
<i>Emptio spei</i>	sale of a chance.
<i>Erga omnes</i>	as against everybody.
<i>Error in negotio</i>	mistake as to the nature of the business.
<i>Et sicuti spes rei quae speratur facit valere stipulationem ita spes personae quae speratur facit valere talem donationem</i>	and just as the expectation of a thing which is hoped for validates a stipulation concerning it, so the expectation of a person who is hoped for validates such a donation.
<i>Ex hypothesi</i>	by hypothesis.
<i>Ex mero motu</i>	of its own accord.
<i>Ex officio</i>	in its official duty.
<i>Exceptio doli</i>	defence of fraud.
<i>Exceptio non adimpleti contractus</i>	the defence that the contract has not been performed by the other party.
<i>Expressio unius est exclusio . . . alterius</i>	the fact that one thing is expressed implies that the other thing is excluded.
<i>Fait du prince</i>	act of the Sovereign.
<i>Fraus omnia rumpit</i>	fraud breaks everything, <i>i.e.</i> , ordinary rules do not apply in case of fraud.
<i>Genus nunquam perit</i>	a class of things never perishes.
<i>Idola fori</i>	common fallacies.
<i>In causa depositi compensationi . . . locus non est, sed res ipsa reddenda</i>	in the case of deposit there is no room for compensation, but the thing itself must be restored.
<i>In facultate solutionis</i>	in the choice of the payment.
<i>In forma specifica</i>	in specific form.
<i>In obligatione</i>	in the obligation.
<i>In pari causa possessor potior haberi debet</i>	other things being equal the possessor is entitled to prevail.
<i>In pari causa turpitudinis cessat repetitio</i>	there is no right of repetition when the parties are equally guilty of disgraceful conduct.

XX ALPHABETICAL LIST OF MAXIMS AND PHRASES.

MAXIMS.	MEANING.
In pari delicto	guilty of the like offence.
Indebitum	something which was not due.
In rem versum	applied to advantage.
Interusurium	the interest accruing in the meantime.
Ipso facto	by the very fact.
Ipso jure	by the law itself.
Judicia decisoria	judgments deciding a question.
Judicia ordinatoria	judgments ordering something to be done.
Jura ad rem	rights to a thing.
Jura in re	rights in a thing.
Jure haereditario	by the right of inheritance.
Jure suo	in their own right.
Jus disponendi	the right to dispose of.
Jus offerendi	the right to make an offer.
Lucrum cessans	gain which ceases.
Manu militari	by employing the officers of justice.
Marché à forfait	contract for a fixed lump price.
Nemo auditur proprium turpitudinem allegans	no one is allowed to found a claim upon his own disgraceful conduct.
Nemo plus juris transferre potest quam ipse habet	no one can transfer a higher right than he has himself.
Nemo potest praecise cogi ad factum	no one can be compelled specifically to perform a personal act.
Non-dominus	one who is not the owner.
Nudum pactum	naked agreement.
Omniem vim cui resisti non potest	every force which is irresistible.
Pactum de quota litis	agreement to pay a proportion of the sum in dispute.
Pendente conditione	during the condition.
Penitus extranei	complete strangers.
Pis aller, a	a bad thing, but the best possible.
Pleno jure	by mere operation of law.
Pretium	price.
Pro tanto	to that extent.
Propria virtute	by its own force.
Quae fortuitis casibus accidunt cum praevideri non potuerant	inevitable accidents are those which it is impossible to foresee.
Quasi ex contractu	as if from contract.
Quasi ex delicto	as if from delict.
Qui facit per alium facit per se	he who acts by another acts by himself.
Qui haeret in litera haeret in cortice	he who sticks at the letter (of an agreement) sticks in the bark of the tree, <i>i.e.</i> , he does not get below the surface.
Qui in mora est culpa non vacat	he who is in default is not free from fault.
Quid debetur?	why is it due?
Quid pro quo	something in return or in exchange for another thing.
Quoad hunc	as far as he is concerned.

MAXIMS.	MEANING.
Rato manente pacto	the agreement standing valid.
Res	thing.
Res certa	determinate thing.
Res inter alios acta aliis non nocet	a transaction between certain persons does not prejudice other persons.
Res judicata	chose jugée.
Res perit domino	the thing perishes for its owner.
Resoluto jure dantis resolvitur jus accipientis	when the right of the giver is dissolved, the right of the receiver is also dissolved.
Restitutio in integrum	restoration to the former situation.
Ronde de lait	a milkman's business.
Salus rei publicae suprema lex	the safety of the state is the supreme law.
Si ob maleficium ne fiat promissum sit, nulla est obligatio	if a promise is made to induce another to refrain from committing a criminal act, the obligation is null.
Si voluero	if I shall choose.
Singuli solidum debent	each owes the whole.
Sine qua non	an indispensable condition.
Solutio	payment or performance, literally untying.
Solutione tantum	by payment only.
Spes	hope.
Spoliator	the despoiler.
Spoliatus ante omnia restituendus	the person who has been despoiled must first of all be restored to his former position.
Status in quo ante	position in which it was before.
Stricti juris	of the strict law.
Toto caelo	by the breadth of the heavens, <i>i.e.</i> , as widely as possible.
Traditionibus et usucapionibus dominia rerum non nudis pactis transferuntur	by delivery and by usucapion property is transferred and not by mere agreement.
Ultra vires	beyond its power.
Unum debent omnes	they all owe one thing.
Unum est in obligatione	there is one thing in the obligation.
Vigilantibus non dormientibus jura . . . subveniunt	laws come to the aid of those who keep awake, not of those who are asleep.
Vinculum juris	legal bond.
Vis major	irresistible force.
Voluntas coacta est voluntas	a consent induced by compulsion is nevertheless a consent.

ABBREVIATIONS.

A.C. or App.C.	Appeal Cases (English).
Adm.	Admiralty Cases (English).
Aubry et Rau	Cours de Droit Civil Français.
Al.	Alinéa.
B.-L.	Baudry - Lacantinerie et Barde, <i>Traité des Obligations</i> . (The whole work of which the <i>Traité des Obligations</i> forms a part is under the name of M. Baudry-Lacantinerie. The separate portions are cited with the names of the co-authors. Thus: B.-L. et Barde, B.-L. et Colin, B.-L. et Wahl.)
B.L.J.	Bulletin de Législation et de Jurisprudence Egyptiennes. Cited with date of judgment, volume and page thus: C. A. Alex. 17 nov. 1898, B.L.J. XI, 17.
Borelli	Législation Egyptienne (Mixed Codes) annotée (Le Caire, 1892).
C.A.	Native Court of Appeal, Cairo.
C.A. Alex.	Court of Appeal of the Mixed Courts, Alexandria.
Can. S.C.R.	Canadian Supreme Court Reports.
Cass.	Cour de Cassation.
C.C.E.	The Egyptian Civil Codes. The number first given is the article in the Civil Code of the Native Courts, and the second number is the corresponding article in the Civil Code of the Mixed Courts. Thus: C.C.E. 402, 490.
C.C.F.	Code Civil Français.
C.C.M.	Civil Code of Egyptian Mixed Courts.
C.C.N.	Civil Code of Egyptian Native Courts.
C.C.Q.	Civil Code of the Province of Quebec.
C. Comm. E.	Egyptian Commercial Codes.
C. Comm. F.	French Code de Commerce.
C. Crim. Inv.	Egyptian Code of Criminal Investigation.
Cf.	Compare.
C. Pen. or C. Pen. E.	Egyptian Penal Codes. Where two numbers are given with a line between them the first refers to the Native Code and the second to the Mixed Code.

- C.C. Proc. or C.C.P.E. Egyptian Codes of Civil and Commercial Procedure, Native and Mixed Codes referred to in same manner as Civil Codes. Thus: 87/91.
- Ch. Chancery.
- Ch.D. Chancery Division.
- Code Esp. Code Civil Espagnol.
- Code Germ. or Code Civ. All. German Civil Code.
- Code Maroc. Code Marocain des Obligations (1913).
- Code Port. Code Civil Portugais.
- Colin et Capitant Cours Élémentaire de Droit Civil Français.
- Cosack Lehrbuch des Deutschen bürgerlichen Rechts.
- D. Dalloz, Recueil Périodique. The first number is that of the year, the second of the part of the volume, and the third that of the page. Thus: D. 81. 1. 452.
- Dall. Rép. or D. Rép. Dalloz, Répertoire Méthodique et Alphabétique.
- D. Rép. Prat. " " Pratique.
- D.N.C.C. " Nouveau Code Civil Annoté.
- D. Supp. " Supplément au Répertoire.
- Droit Comm. Droit Commercial.
- Dig. or D. Digesta Justiniani.
- Gaz. Pal. Gazette du Palais.
- Gaz. Trib. Gazette des Tribunaux Mixtes d'Egypte.
- Girard, Manuel Girard, P. F., Manuel Élémentaire de Droit Romain.
- Halsbury (Earl of) Laws of England. "A Complete Statement of the Whole Law of England," in an alphabetical arrangement on a scale comparable with the *Pandectes Françaises*.
- Halton Halton, H. W., Elementary Treatise on Egyptian Civil Codes.
- Ib. Ibidem, in the same place.
- Inst. Institutiones Justiniani.
- K.B. King's Bench.
- l.c. loco citato, in the place quoted above.
- L.E. Livres Egyptiennes.
- L.J. Law Journal (English).
- L.R. Law Reports (English).
- Lantz Répertoire Général de la Jurisprudence Egyptienne.
- Loché Législation Civile, Commerciale et Criminelle de la France.
- Mohammedan Personal Law.. Code of Mohammedan Personal Law, according to the Hanafite School, by Mahommed Kadri Pacha, translated by Sterry and Abcarius (Spottiswoode, 1914).

M.C.C.	Mixed Civil Code.
M.C. Proc.	Mixed Code of Procedure.
N.C.C.	Native Civil Code.
N.C. Proc.	Native Code of Civil Procedure.
O.B.	Official Bulletin of the Native Tribunals.
Oblig.	Obligations.
Op. cit.	Opere citato, in the work quoted above.
P.	Probate and Admiralty (English).
Pal.	Journal du Palais.
P.F. or Pand. Franç.	Pandectes Françaises (Nouveau Répertoire).
P.F. pér. or Pand. Franç. pér.	Pandectes Françaises Périodiques.
Planiol	Planiol, M., Traité Élémentaire de Droit Civil, 6th ed.
Q.B.	Queen's Bench.
R.J.Q.	Rapports judiciaires de la Province de Quebec.
R.O.	Recueil Officiel des arrêts de la Cour d'Appel Mixte.
R.R.	Revised Reports (English).
Rép. Prat.	Dalloz, Répertoire Pratique.
Rev. Crit.	Revue Critique.
Rev. Prat.	Revue Pratique.
Rev. Trim.	Revue Trimestrielle.
Ry.	Railway.
S.	Sirey, Recueil général des lois et arrêts.
Sayour, Rép.	Répertoire de la jurisprudence des Appels Sommaires des Tribunaux Mixtes d'Egypte (Alexandrie, 1916).
Sourdau.	Traité de la Responsabilité, 5th ed.
Statut Personnel.	D'après le rite Hanafite (Kadri Pacha), or English translation by Sterry and Abcarius under title Code of Mohammedan Personal Law.
Statut Réel or Stat. Réel	D'après le rite Hanafite (Kadri Pacha).
Ut supra, or ut sup.	As above.
V ^o	<i>Verbo</i> , i.e., under the word.

Eléments de droit civil de la Province de Québec, Recueil
de jurisprudence, 1916, 1917, 1918, 1919, 1920, 1921, 1922, 1923, 1924, 1925, 1926, 1927, 1928, 1929, 1930, 1931, 1932, 1933, 1934, 1935, 1936, 1937, 1938, 1939, 1940, 1941, 1942, 1943, 1944, 1945, 1946, 1947, 1948, 1949, 1950, 1951, 1952, 1953, 1954, 1955, 1956, 1957, 1958, 1959, 1960, 1961, 1962, 1963, 1964, 1965, 1966, 1967, 1968, 1969, 1970, 1971, 1972, 1973, 1974, 1975, 1976, 1977, 1978, 1979, 1980, 1981, 1982, 1983, 1984, 1985, 1986, 1987, 1988, 1989, 1990, 1991, 1992, 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 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THE LAW OF OBLIGATIONS.

CHAPTER I.

OBLIGATIONS IN GENERAL—THEIR SOURCES AND CLASSES.

Definition of an obligation.

THE Egyptian Native Code defines an obligation as follows, in Article 90/144: "*An obligation is a legal bond, the object of which is to procure an advantage for one person by constraining another to do or abstain from a definite act.*"

This definition is a modification of the definition of a contract given in the French Code (art. 1101). *Le contrat est une convention par laquelle une ou plusieurs personnes s'obligent envers une ou plusieurs autres à donner, à faire ou à ne pas faire quelque chose.*

The legal bond may arise from a contract or from one of the other sources of obligations which will be mentioned immediately, and the definition of the Egyptian Code states clearly enough the essential characters of an obligation. It is true that the person who is bound is always bound either to an act or an abstention. The obligation to give is a kind of obligation to do a definite act. But there are so many important differences between the effect of this obligation and that of other obligations to do that it is better to class the obligation *à donner* separately. I prefer therefore the definition of Aubry and Rau:—*Une obligation est la nécessité juridique par suite de laquelle une personne est astreinte envers une autre, à donner, à faire ou à ne pas faire quelque chose.* (5th ed. 4, p. 3.)

Term obligation a metaphor.

The term obligation and the expression "legal bond" or *lien de droit* are metaphorical, and are inherited from the Roman law. The two parties are conceived of as bound together by an

imaginary chain—the *juris vinculum*; and when the debt is paid or performed there is, in the language of the Roman law, an unfastening of the chain by which the debtor was bound. The technical term of the Roman law for the fulfilling of an obligation was “the untying”—*solutio*.

Parties to an obligation.

In an obligation there must always be a person who is entitled by law to exact the performance of the obligation by the other. This person is called the creditor. Conversely, there must always be a person who can be compelled to make the performance. This person is called the debtor. But there may be several creditors, to each of whom the debtor is bound by the same obligation, or several debtors, each of whom is bound by the same obligation to the same creditor; or there may be several creditors in favour of whom several debtors are bound. When there is a plurality of creditors it may be that each of them is entitled to claim the payment of the whole debt, and that the payment to one of them liberates the debtor. Or it may be that each of the creditors is entitled only to claim an aliquot share of the debt. And, in like manner, when there are several debtors it may be that each of them can be called upon to pay the whole debt; or, on the other hand, that each of them is liable only for his share. This will be explained when we come to speak of joint obligations and joint and several obligations.

The two faces of an obligation.

If we look at an obligation from the point of view of the creditor the obligation is an asset—a *créance*. In making up a statement of his assets the creditor will properly include sums due to him by others in virtue of obligations. If, on the other hand, we look at an obligation from the point of view of the debtor it is a debt which should be included among his liabilities if he were making a statement of his financial position.

But in many of the obligations arising from contract the situation is not so simple as this. Neither of the parties is purely a creditor or purely a debtor.

This is because those contracts which are called bilateral produce several obligations. In the contract of sale, for example, the seller has the obligation to deliver the thing and to make certain warranties, and in respect of these things he is a debtor.

On the other hand, he is entitled to claim the price and in this respect he is a creditor. Conversely, the buyer is a creditor who can compel delivery of the thing bought, and a debtor who can be compelled to pay the price. But although the parties to a contract of this class are at the same time creditors and debtors, if we analyse the contract it is found to consist of a number of obligations in each of which there is one party who is purely a creditor and another who is purely a debtor.

Legal nature of a right of obligation.

In French the word *droit* is unfortunately ambiguous. It may mean the law which protects the rights of individuals, and sometimes creates these rights; or, on the other hand, it may mean the rights themselves which are so created or protected.

If A makes a contract with B to pay him a sum of money it is the *droit civil* to which B can appeal to enforce the payment of the debt. If A wrongfully injures the person or property of B it is *le droit*, that is, *le droit civil*, to which B can appeal to compel A to make reparation. But in both these cases the right which B has is itself designated as a *droit*. In order to avoid this ambiguity French writers commonly speak of the law which sanctions the right as *le droit objectif* (e.g., Capitant, *Introduction*, 3rd ed., p. 87). In English no ambiguity of this kind is possible because the authority which sanctions or creates the right is called the "law," while the word "right" is reserved for the legal interest which is so sanctioned or created. To take the illustration just given, we should need to say in French that B has a *droit subjectif* which is protected by the *droit objectif*, whereas in English we can say more clearly and simply that B has a right which is protected by the law. Legal rights may be classified in various ways, but perhaps the most convenient classification of them is to divide them first into two groups: (a) political rights, and (b) civil rights. Under political rights will fall the right to vote at an election of the members of a legislative body, or of any local councils to which the management of certain public affairs is delegated by the law, as well as the right to be elected to any public office.

A man may enjoy full legal capacity and be in possession of all civil rights and yet by the constitution of the country in which he resides he may have no political rights.

On the other hand, in countries where slavery does not exist all persons enjoy civil rights, by which we mean that they are

entitled to have their liberty protected, that they can own property and dispose of it, and so forth. It is true that for their own protection certain persons, for instance, minors, can claim that their capacity is limited, and a man may be deprived of some of his civil rights as part of a punishment inflicted for breach of the penal law.

Civil rights again may be divided into three classes: (a) public rights; (b) rights of status; and (c) patrimonial rights.

(a) **Public rights.**—Under public rights will fall the rights to be protected against attacks on one's person, reputation or property, the right of freedom of speech, freedom of religion, *i.e.*, the group of rights frequently spoken of as rights of civil and religious liberty, the nature and extent of which depend upon the public law of each State. These rights may have a pecuniary value, as is seen in the fact that a man whose reputation has been wrongfully aspersed may obtain damages, but the law does not regard these, primarily, as patrimonial rights. If a man were making up a balance-sheet of his assets and liabilities he would not put down among his assets a sum of money as representing the value to him of his public rights, inasmuch as these are rights which he cannot dispose of or in any way turn into money. The damages to which he may, in certain events, be entitled as reparation for an attack upon his public rights, are not intended to be a pecuniary equivalent for the rights attacked but as a punishment upon the wrongdoers.

(b) **Rights of status.**—These are the rights which belong to certain persons in virtue of their forming part of a particular family. A person has certain rights given to him by law as a husband, a wife, a child, a son-in-law, etc. Most of these rights belong to the personal law and are not primarily patrimonial, such as the authority which the husband may have over the wife, or the father over the children. But some of the rights of status or *droits de famille* are of a pecuniary nature, such as the right to claim an alimentary provision, and this right, as will be more fully explained later, is regarded as being an obligation created by law and therefore falls within our scope, while the other rights of status are excluded from it.

(c) **Patrimonial rights.**—Under this head fall all those rights which are primarily of a pecuniary character and would properly be included among his assets by a man who was making up a statement of his pecuniary position. These patrimonial rights must be divided into absolute rights and relative rights, to use a ter-

minology which is coming into favour, or, if we employ the traditional terms, into real and personal rights.

Absolute or real rights and relative or personal rights.

Absolute rights.

Patrimonial rights are of two kinds which differ widely as to their effects. In the first place, a man may have the right to enjoy the possession and use of some portion of the physical world, immovable or moveable, and to dispose of it as he thinks fit. This is what we call ownership. The owner, provided he possesses full personal capacity, can do what he likes with his own except in so far as there may be provisions of law which prohibit an owner from doing certain things; or, in the second place, a man may have become entitled to exercise over some property which does not belong to him some right or several rights which normally belong to an owner. He may have, for example, the usufruct, that is, the right of using and enjoying property, whether moveable or immovable, which belongs to another. Or he may have over an immovable which belongs to another a right of the kind called a servitude. Or, thirdly, he may have over property which belongs to another a special right of security, such as a pledge over moveables or immovables, or a hypothec or judgment-charge over immovables, and, if certain provisions of the law have been complied with, this right of security is a real right. The owner of property, or the person entitled to the enjoyment of the real right, is protected by the law against attack. If any one interferes with him by getting possession without his consent of the thing over which his right of property extends, or by preventing his full enjoyment of it, or by depriving him of the enjoyment of his right of servitude, or of his right of security, he has an action to prevent this interference and to be restored to the full enjoyment of his right. His title to this action does not depend on the fact that the defendant is bound to him by contract or has been guilty of any fault. It may be that the person who has interfered with him was in perfectly good faith. The title of the person whose right is real is given to him by the law itself. It is not a right against a particular person but a right against all the world, a right to cry "hands off" to anyone who interferes with him. On this account such rights were called by the Roman lawyers *jura in re*, and are called in the modern French law real rights or absolute rights.

Relative rights.

In sharp contrast to this group of rights we have those rights which consist in a claim against a determinate person to compel him to deliver some material thing or to do or abstain from doing some definite act. Here the right exists only against a particular debtor, either the person originally bound or some person who has succeeded to his liability. The debtor is bound because he is "obliged," and to that extent he is in a different position from the rest of the world. If I am the owner of a house my right to the uninterrupted enjoyment of it is a right as against everybody—*erga omnes*. But if I am the lessee of a house my right to be protected in its enjoyment is a right against my lessor only. These rights or claims against a particular debtor were called by the civilians *jura ad rem*, and are now known as personal rights or relative rights, though the best name of all for this class of rights is "obligations."

The distinction between the two groups is very clearly and shortly stated by Pothier in these terms:—

Le jus in re est le droit que nous avons dans une chose, par lequel elle nous appartient au moins à certains égards. Le jus ad rem est le droit que nous avons non dans la chose mais seulement par rapport à la chose, contre la personne qui a contracté envers nous l'obligation de nous la donner. (Traité du droit de domaine de Propriété, n. 1.)

The right of the creditor is essentially a right to control the debtor with regard to the particular thing which is the object of the obligation. To a certain extent the debtor has limited his freedom of action. Savigny, who gives an admirable analysis of the nature of an obligation, defines it thus:—"The control over another person, not, however, over this person as a whole, for then his personality would be taken away, but over certain particular acts of his which must be regarded as subtracted from his freedom and subjected to our will." (*Obligationrecht*, chap. 1, s. 2.) The creditor has a right against the debtor which he has not against anyone else in the world. The debtor may in this particular respect be regarded as a slave. He has surrendered his liberty. This is why the law will not enforce certain obligations which involve too great a loss of liberty.

Thus, a contract by which a servant binds himself for his life is null. (C. C. E. 402 490; C. C. F. 1780; C. C. Q. 1667. See Req. 15 janv. 1890, D. 91. 1. 31, and *infra*, p. 165.)

It is only as regards particular acts that the law will allow a man to give up his freedom. It is true that in some contracts the debtor is bound to an indefinite number of acts extending, it may be, over an indefinite time. Thus, the period of a mandate may be undetermined, and a partnership may be for an unlimited time. But it is significant that the mandatory may, subject to certain conditions, always put an end to the mandate by renunciation. (C. C. E. 522/640; C. C. F. 2007; C. C. Q. 1759.)

And when no term is fixed for a partnership any partner can retire at will if he does so in good faith and not at an inconvenient time. (C. C. E. 445/542; C. C. F. 1869; C. C. Q. 1895.) The law will not allow a mandatory or a partner to place himself in a position which might be a kind of perpetual slavery. An obligation then involves the control over another person, but a control which extends no further than to compel him to do certain particular things and not altogether to surrender his free will to the creditor.

Is it essential that a personal right should be only for a limited period of time?

It has been suggested that a personal right by its very nature cannot be perpetual. But this does not appear to be sound. An obligation cannot be perpetual when that would involve too great a limitation of human freedom. And the hire of things cannot be perpetual, probably because it is considered to be against public policy to debar for ever the owner of property from its enjoyment. (See Viollet, *Histoire du Droit Civil Français*, 2nd ed. p. 724.) The codes say the hire of things must be "during a certain time." (C. C. E. 362/445; C. C. F. 1709; C. C. Q. 1601.) And in France the duration of a lease cannot be for more than ninety-nine years, by the *loi de* 18—29 décembre, 1790. (Aubry et Rau, 5th ed. 5, p. 282.) But although there may be reasons of public policy against allowing certain obligations to extend over an indefinite time it is not essential to a personal right that it should be only for a limited period. It is true that such rights are seldom intended to go on indefinitely, whereas it is quite otherwise with real rights and with rights of status. Real rights are frequently perpetual. There is no reason, for instance, why a servitude should not go on for ever, and in most cases its duration is not limited in point of time. And it is one of the marks of rights of status that they are intended to go on indefinitely so long as the party who owes

the right and the party to whom the right is owed both continue to live. A father or a husband continues to be bound by the duties which fall upon him in that character so long as he is a father or a husband.

Personal rights in very many cases consist in obligations to give or to do something, the giving or doing of which puts an end by a single act to the relation between the parties. If I owe you 50*l.* and I pay my debt at the proper time, there is no longer any obligation subsisting between us. But all obligations are not of this kind. The lessor and the lessee, for example, both bind themselves to a definite series of acts. And although in this case this can only be for a certain time it is quite conceivable that a personal right may be perpetual. A French case offers an interesting illustration of this possibility. The authorities of a hospital by a contract bound themselves to place a certain number of beds in the hospital at the disposal of a medical faculty for the purposes of clinical teaching. No period of time was fixed, and it was held that this was an innominate contract, not the lease of a thing, and that it created a perpetual obligation. (Cass. 25 juin, 1907, D. 1908, I. 81, note. Cf. Cass. 17 août, 1880, D. 81. I. 452; Cass. 24 juill. 1884, D. 84. I. 185.)

Practical consequences of the distinction between real rights and personal rights.

The distinction between a real right and an obligation is specially important from three points of view:—(a) the determination of the object; (b) the right of following the object into the hands of third parties—the *droit de suite*; and (c) the right of preference.

(a) *Determination*.—A real right can exist only over a determinate thing. If I sell you 100 kantars of cotton you do not acquire the real right of ownership over them until they have become determinate, and, according to the Egyptian law, determination does not take place until the cotton is delivered. (C. C. E. 268/338.) But if I sell you my house or motor-car you become the owner of it at once by the effect of the contract. You may have a relative right to a thing which is still indeterminate, as if I sell you a part of a quantity of fungibles, such as twenty yards of silk which is still in the piece, or sell you some article which I have to procure or to get manufactured, but you cannot at present have any absolute or real right. It is this

principle which is stated in the Egyptian Codes in the terms:—
 "An obligation to transfer a thing transfers *ipso facto* the ownership thereof, when the thing in question is a specific corporeal thing whereof the party bound is owner." (91/145.) This article will be referred to again in speaking of the obligation to give.

(b) *Droit de Suite*.—As we have seen, it is of the essence of a real right that the person in whom the right is vested can exercise it against all the world. If, for example, I have a right of hypothec over a house it is immaterial to me that my debtor sells the house or that the purchaser from him sells it again, because my right of hypothec continues to subsist and is unaffected by the sales. In like manner, if I have a right of servitude over my neighbour's land and in favour of my land, a purchaser to whom I sell my land will be entitled to exercise the servitude against the owner of the servient land for the time being. But if I have a personal right against A this is entirely relative, and I cannot exercise it against anybody except A or some person who has succeeded to his liability.

(c) *Right of preference*.—The creditor whose debt is secured by a real security has a preference over ordinary creditors. If I have given to A a hypothec over my house and I become bankrupt, A will be entitled to payment in full out of the price of the house, although the other creditors have to be content with an equal dividend unless some of them have also real securities or unless their claims enjoy some legal privilege.

Criticism of distinction between absolute rights and relative rights.

It is urged by many modern writers that the distinction between absolute rights and relative rights, or, as I should prefer to call them, between real rights and obligations, is by no means so fundamental as it was considered to be by the older authorities. The marks indicated by the old writers as characteristic of real rights are not invariably present nor are these marks, in all cases, confined to rights which are real. It is pointed out that the owner of a real right has not, necessarily and in every case, the *droit de suite*. If I buy a specific article from you I become the owner of it by the effect of the contract without delivery, but if you subsequently sell the article to B, who is in good faith, and deliver it to him, I have no *droit de suite*, because the rule applies *en fait de meubles la possession vaut titre*. Moreover, on the other

hand, the right of preference is not confined to persons who enjoy real rights. A creditor who has merely a right of obligation may have what is called a privilege which entitles him to be paid before ordinary creditors, and even in some cases before hypothecary creditors. Thus, there is such a privilege for taxes, for servants' wages for a year, etc. (C. C. E. 601/727.) And a lessee, whose right is not real, can, if his lease has a legally established date, oppose his right to that of a purchaser of the property whose right is real. (Art. 389/474.) But, apart from such criticisms of detail, it is argued upon more general grounds that the distinction between real rights and rights of obligation is not a radical one. To say with the old lawyers that the person entitled to a real right has a right *in re*—in the thing itself—is, it is maintained, an inexact use of language. His right is always against some person, and consists generally in the right to compel this person to refrain from interference with him. Every right, of whatever kind it may be, must necessarily have for its object the compelling of a person to do some act or to abstain from some act. The owner of property or the person entitled to a servitude cannot exercise his right if it is disputed except by bringing an action against a person.

As Ortolan very clearly puts it:—*Tout droit en définitive, si l'on veut aller au fond des choses, se résume en la faculté pour le sujet actif d'exiger du sujet passif quelque chose: or la seule chose qu'il soit possible d'exiger immédiatement d'une personne, c'est qu'elle fasse ou qu'elle s'abstienne de faire, c'est-à-dire une action ou une inaction. C'est à cela véritablement que se réduit tout droit. Cette nécessité pour le sujet passif de faire ou de s'abstenir, est ce qu'on nomme dans la langue juridique une obligation. Tout droit consiste donc en des obligations.* (Législation Romaine, I, p. 637.)

It is argued in support of this theory that it is illogical, and even absurd, to speak of rights in or over parts of the physical world without reference to any person other than the owner of such rights. When we say that a man is the owner of a right this must mean that he is entitled to enforce it against other persons. It is only as a member of a society that a man can have a legal right. The law regulates the relations of men living in society, Robinson Crusoe on his island could not own the island or anything upon it, nor have any right over the property of others upon it, for the plain reason that there was no such thing as property upon the island, nor any authority which could make laws creating

ownership or any other rights. A real right, then, must be a right against persons, and the difference between it and an obligation consists merely in this, that, whereas the debtor in the obligation is a single definite person, the debtors in the case of a real right are all persons other than the owner of a right. (In this sense, Planiol, 6th ed. I, n. 2163; Ripert, *de l'exercice du Droit de Propriété*, Thèse, Paris, 1902, p. 290; Roguin, *La Règle de Droit*, nos. 119 *seq.* and n. 144; Demogue, R., *Les Notions fondamentales du Droit privé*, p. 416, and authorities there referred to.)

New theory not satisfactory.

The argument we have shortly stated is convincing enough so far as it consists in the affirmation that we cannot conceive of a right to a thing or in a thing without reference to persons other than the owner of the right. Nevertheless the new theory tends to create confusion. It may be true that the *droit de suite* and the *droit de préférence* are not infallible *indicia* of real rights.

But this does not alter the fact that between real rights and obligations there is a great gulf. When we say that if a man is the owner of property all other persons are under an obligation not to interfere with him, all that we mean is that these other persons are bound to obey the general law of the country. Until there has been an invasion of the owner's right there is no *lien de droit* between him and any other person arising from his right of ownership. When there has been an invasion of his right it is true that a legal relation arises between the owner and the person who interferes with him. (1) He has a right of action against the person interfering with him, but this is as an owner and not as a creditor. His claim against the person interfering does not constitute his right of ownership, it is merely incidental to it. His right is against everybody and it may be necessary to enforce it by action to-day against A and to-morrow against B, and, on the next day, against C. Quite different is the case of the creditor in an obligation. He has only one right and it is against a definite debtor. Just as all persons are bound by the general law to respect rights of property so are they bound also to respect the freedom, safety and reputation of their neighbours. I have a legal duty not to injure my neighbours A, B, C, and so on, indefinitely. But to call this an obligation is an abuse of language, or, at any rate, if we do give that name to it we shall have to find a new term to denote the personal rights which the

old writers call obligations. It seems on the whole better to restrict the term obligation to the special right against a particular debtor.

In this sense, Baudry-Lacantinerie et Chauveau, *Biens*, n. 3; Capitant, *Introduction*, 3rd ed. p. 90.)

2. An additional reason for rejecting the modern theory is that the absolute rights or rights *erga omnes* are not necessarily patrimonial rights, or patrimonial rights in the sense in which obligations are such. If I am making up a statement of my assets the obligations in which I am a creditor will form a part of my assets which are at present unrealised. I have a claim against A arising from contract, a claim against B for damages on account of a wrong which he has done me, and so forth. But in such a statement of my assets, if I am the owner of a house I put down its value as an immoveable as one of my realised assets. I do not put down the value to me of my right of preventing A, B, C and D from interfering with me in the possession and enjoyment of my house.

And I certainly do not put down among my assets the value to me of the right to prevent A, B, C and D from committing an assault upon me or from injuring my reputation.

Summary.

In the following pages accordingly, the term "obligation" will be restricted to relative, or personal rights, that is to say, rights in favour of a definite and particular person called the creditor, and forming a part of his patrimony, and against a definite and particular person called the debtor, and to be included among his debts.

Ambiguity in the term personal rights.

Although the expression personal rights is so consecrated by long usage that it seems almost pedantic not to employ it, its use is apt to create misunderstanding.

By a personal right is sometimes meant not a relative right or right of obligation of the kind which we have been explaining, but a right which is so strictly confined to the person of the creditor that it is not transmissible to his heirs. For instance, in this sense, a usufruct is a personal right because it dies with the usufructuary, though it is a real right in the sense of being an absolute right or a right against all the world.

If we use the term personal rights as opposed to real rights we must be careful to avoid this ambiguity. We must also bear

in mind that when the codes say that a man's creditors can exercise his rights of action "*save only such rights of action as are purely personal*" this does not mean that the creditors cannot sue for payment of any debt which is a personal right of the debtor.

The rights "purely personal" form a much more restricted class as will be explained in dealing with the indirect action by the creditor. (C. C. E. 141/202; C. A. Alex. 25 févr. 1891. B. L. J. III, 244. *Infra*, 2, p. 100.)

Various classes of obligations.

Obligations may be classified from various points of view, and, more particularly: (1) according to their sources, (2) according to their object, (3) according to their legal effect, and (4) according to the modalities which modify them. (Beudant, *Contrats*, n. 427.)

(1) The sources of obligations.

Classification in Egyptian Codes.

According to the Egyptian Code "*obligations are created by an agreement or result from an act or event or are imposed by the authority of the law.*" (93/147.) This classification is more scientific than that of the French Code. According to the Egyptian Code any obligation whatever can be brought under one of these three heads:—

(a) The debtor is bound because he has given his consent to be bound, or, in other words, he is bound by contract.

(b) The debtor is bound by reason of an act, and this act may be (1) a benefit-producing act, or (2) a damage-producing act. In the first case he is bound because he has received from another money or money's worth in such circumstances as make it equitable that he should pay for the benefit which he has received. He is liable, to use a common expression, in virtue of the rule which does not allow unjust enrichment. The circumstances in which this liability arises will be explained later. In the second case he is liable, because by his fault, or the fault of some person in his charge or employment, damage has been caused to another, and the owner of an animal or of a building is, in like manner, liable for the damage caused to another by his property.

(c) In the third case the debtor is liable simply because the law says that persons in his position shall be liable, although there has been no act on his part or on that of another to cast the liability upon him.

Classification in French Code.

The French Code, in this respect following Pothier, divides obligations into two main groups:

(1) Contracts or obligations arising from the agreement of parties; and (2) obligations, or, as the French Code styles them in this place, *engagements*, which arise without any such agreement. (C. C. F., Liv. III. Tit. III. the Heading; and Liv. III. Tit. IV. the Heading.) This second group is further subdivided, as will be afterwards explained.

Distinction between conventions and contracts.

The French Code also follows Pothier in making a distinction between a convention and a contract. Every agreement between parties with regard to an object of juridical interest is a convention, but it is not necessarily a contract. An agreement to extinguish a debt by the release of the debtor, or to modify an existing contract is a convention, but it is not a contract. By a contract in the strict sense is meant a convention which *creates* an obligation.

Convention is the genus and contract the species. Some writers say that a convention which has for its object the transfer of a right is likewise a contract, but, as Planiol says, the transfer of the right is the consequence of the creation of the obligation to give which is executed as soon as it is formed. The contract is only translatif because it creates an obligation. If I sell you my house the immediate effect of the contract of sale is to create an obligation in which I am the debtor to deliver to you the ownership of the house. The effect of this obligation in the modern law is that you become there and then the owner. (Planiol, 2, n. 943; Aubry et Rau, 5th ed. 4, p. 466.) This distinction of language between convention and contract is not important and the term convention is frequently used as synonymous with contract.

Sources of obligations which arise without agreement.

When we consider the various ways in which an obligation may be created we are driven to the conclusion that there are in fact only two possible sources: (1) the agreement of parties, and (2) the law. In a certain sense it is of course true that even the obligations which arise from contract are the creation of the law, but between these obligations and all others there is, nevertheless,

an important distinction. It is true that if two parties make an agreement their agreement has no legal effect unless there is a law which gives its sanction to it, but, in this case, it is the will of the parties which is the primary source of the obligation and the law, which is, if we like to say so, the secondary source. The law declares that the agreements of parties, if they are of a nature which is not prohibited and are intended to affect legal rights, shall be enforced by the authority of the courts. But in the non-contractual obligations the liability of the parties arises from the law itself and independently of their will. It is quite correct to say with regard to all of them that it is the law and the law only which creates the liability. Neither the Roman law nor the French law, however, is content with this simple division of the sources of obligations. The Roman law of the time of Justinian classified the sources of obligations under four heads: (1) *contracts*; (2) *delicts*; (3) obligations arising *quasi ex contractu*, and (4) obligations arising *quasi ex delicto*. (Inst. 3. 13. 2; Girard, *Manuel*, 5th ed. p. 390.) The Roman lawyers saw that there were certain cases in which equity required that a man should pay for a benefit which he had received, although he had never undertaken to do so, and they said, logically enough, that he was liable here as if he had made a contract. Further, in the Roman law there were a certain number of definite delicts or torts, and the man who had committed one of these special wrongs was bound to pay a penalty or to make reparation. But there was no general rule that a man was liable for damages caused by his fault, and, in course of time, the list of definite delicts was found to be inadequate.

Accordingly, liability came to be recognised for a number of other wrongful acts, and in these cases the lawyers said that the wrongdoer was liable *quasi ex delicto*, i.e., as if he had committed one of the enumerated delicts of the older law. The Glossators, the mediæval commentators on the Roman law, invented the substantives *quasi-contractus* and *quasi-delictum* and the French law, at any rate since the eighteenth century, has currently employed the terms *quasi-contrats*, and *quasi-délits*. But examination of all possible ways in which an obligation might arise led to the conclusion that there were some of them which it was impossible to bring under the head of any one of the four sources, contracts, quasi-contracts, delicts, and quasi-delicts. The liability, for example, of a son to support his indigent father did not arise from a contract, or from an unjust enrichment, or from an act of

wrongdoing intentional or unintentional. All that one could say about it was that the son was liable because the law said he should be liable. Accordingly, Pothier and the French Code, which, as regards obligations, follows him almost servilely, classify the sources of obligations as follows:—(1) contracts; (2) quasi-contracts; (3) delicts; (4) quasi-delicts; and (5) the authority of the law solely. (C. C. F. 1370.) According to this classification, the liability may arise without agreement in three cases: (a) from a voluntary and lawful act, in which case we say that it arises from a quasi-contract, though it is a manifest abuse of language to employ a term which suggests that we have here something which is like a contract. Agreement is of the essence of contract and any case where there is no agreement must differ *toto caelo* from a contract. Or, (b) in the second place, the liability may arise from an unlawful act, and this unlawful act may be either intentional or unintentional. If it is intentional it is called a delict. If it is unintentional it is called a quasi-delict. Lastly (c) we have the small group of cases in which the liability arises without any act at all.

This classification is now generally condemned. The distinction between a delict and a quasi-delict is unimportant. In both cases the liability arises from an unlawful act, and the question of intention has no bearing except that the Court may be inclined to make a liberal estimate of the damages when the wrong was done intentionally.

The term quasi-contract, as will be explained when we reach that subject, is artificial and misleading, and the liability arising from a wrong, or from what is improperly called a quasi-contract is, after all, neither more nor less than a liability which is directly created by the law. The simple classification of the sources of obligations is still the best, viz., that they can all be divided into (1) obligations arising from contract; or (2) obligations created by law. (See Planiol, 2, n. 807; B.-L. et Barde, 1, n. 5; Colin et Capitant, 2, p. 271.)

The theory of declaration of will as a source of obligations.

The German Code in a certain number of special cases, particularly in offers to contract, has admitted the possibility of a man being bound merely by his own declaration of will without any acceptance by the other party. (See art. 116 *seq.*; Cosack, *Lehrbuch*, 6th ed. 1, p. 145; Saleilles, *Déclaration de Volonté*, p. 127; Windscheid, *Pandekten*, 8th ed. 2, s. 304.) The theory

that a unilateral declaration of will can create an obligation was supported by many modern writers, principally German, before it was thus admitted by the legislator.

It is certain that neither the French nor the Egyptian codifiers recognised the possibility of an obligation arising in any such way, but the theory is an interesting and important one. (See Saleilles, *Théorie Générale de l'Obligation*, nos. 138 to 144; B.-L. et Barde, 1, n. 28; Planiol, 2, n. 831; see, however, Colin et Capitant, 2, p. 271.)

(2) Objects of obligations.

Classified according to their object obligations are of three kinds, viz., to give, or to do, or not to do. The obligations to give, or to do, are called positive obligations, and the obligations not to do are called negative obligations.

(a) The obligation to give.

The obligation to give is the obligation to transfer the ownership of a thing, whether it be an immoveable or money, or fungibles, or a specific thing, or the obligation to convey a real right. The term "to give"—*de donner*—does not mean here to make a gift; it is *dare* not *donare*.

The obligation to give is always a conveyance. It is called in the Egyptian Code the obligation to *transfer* a thing. (91/145.) In this obligation the intention of the parties where the obligation arises from contract, or the disposition of the law when the obligation is non-contractual, is always to transfer to the creditor the ownership of a thing or a real right in a thing.

Obligation to give not synonymous with obligation to deliver.

Some French writers take the expression to give—*donner*—in a wider sense. They include in this class every obligation to deliver a specific thing whether the obligation is translatiue, that is to say, is a conveyance of ownership, or of a real right, or whether it is merely to give to the creditor a personal right. For instance, the lessor is bound to deliver the thing leased, and the lender is bound to deliver the thing which he has promised to lend, and according to these writers such obligations would be obligations *de donner*. (See Laurent, 16, nos. 187, 189; Demolombe, 24, n. 396.)

It seems to be clear, however, that the French Code does not use the term *donner* in this wider sense. It says that the obligation to give includes that of delivering the thing, and that the delivery makes the creditor the owner of the thing. (Cf. arts. 1136 and 1138.) The obligation to deliver when it is not translatiue of ownership or of a real right, is best considered as an obligation *de faire*. (Aubry et Rau, 5th ed. 4, p. 60, note 3; Colmet de Santerre, V. n. 52, *bis* 1. *Contra*, Larombière, art. 1136 n. 3 *seq.*; Boudant, *Contrats*, n. 430.)

According to the view of Larombière, the criterion is whether the obligation can be enforced *manu militari*, and, seeing that an obligation to deliver, such as the obligation of the lessor, can be so enforced, he would classify this as an obligation *de donner*. But the better opinion is that the French Code intends to confine the term *obligation de donner* to those obligations which are at the same time conveyances. And the Egyptian Code by employing the word "transfer" shows clearly that *donner* is to be taken in this sense.

Effects of obligations to give.

It will be necessary to explain these in detail in speaking of the effect of contracts and of the modes in which the performance of a contract can be enforced. It is sufficient to say here that the obligation to give a specific thing of which the debtor is owner transfers the ownership to the creditor there and then without any further requirement such as the necessity of delivery (C. C. E. 91/145), and that the obligation to create a real right in like manner transfers such right except in the case of rights of privilege, hypothec, and retention. (C. C. E. 92/146.)

Privileges are created by the law and not by the agreement of the parties. Hypothecs must be created by an official instrument, and the right of retention requires that the person entitled to it shall be in possession of the thing. But, although other real rights, such as usufruct or servitudes, are validly transferred by the mere contract as against the transferor, we must remember that they are not, generally speaking, created as against third parties except by transcription. (C. C. E. 611/737.)

(b) The obligation to do.

The obligation to do—*obligation de faire*—includes all obligations the object of which is an act which the debtor has bound

himself to perform. Under this head for the reasons just stated we include the obligation to deliver except when that obligation arises from a contract to transfer ownership or a real right. There is an infinite variety of such obligations, the obligation of the lessor to procure for the lessee the continued enjoyment of the thing leased, that of the lessee to use the premises in a certain way, and to furnish them, that of the artist to paint a picture, that of the servant to do the work which he has contracted to do, and so on. The same contract may include obligations to give and obligations to do. Thus the obligation of the vendor is primarily to give the ownership, but he is also bound by obligations to do, in so far as he undertakes certain warranties.

The obligation to do may arise without contract. Thus the *negotiorum gestor* is bound to go on with the *gestion* which he has commenced. (C. C. F. 1372.) And obligations to do are likewise created by the law solely, such as the obligations arising from status; for example, that of the wife to follow the husband if he changes his place of residence, and so forth. (See C. C. F. 214. Cf. for the milder rule in Mohammedan law as to three days' journey, Clavel, *Statut Personnel*, 1, p. 169.)

(c) The obligation not to do—Obligation de ne pas faire.

This includes all those obligations in which the debtor is bound to abstain from doing an act which otherwise he would have the right to do. The object of his obligation is an abstention instead of an act. The vendor of a business may bind himself not to carry on a similar business within a certain area; the lessor of a shop may bind himself not to let neighbouring premises which belong to him to a person who will carry on the same kind of business as the first lessee; an employer of labour may bind himself not to employ any workman except such as belong to a trade union; an actor may bind himself not to perform during a certain season upon any stage except one. It is unnecessary to multiply examples.

Obligations not to do, like obligations to do, may be created without agreement. Neighbouring owners, for example, owe certain negative obligations to one another, such as that of not using their property so as to become a nuisance. But it is in connection with contracts that the distinction between obligations according to their object comes to be of importance. The most important practical consequence is that the performance of some

of these obligations can be specifically enforced, while, in other cases, the creditor must be content with damages.

The consideration of this subject will be deferred until we come to speak of remedies for breach of contract. (*Infra*, 2, p. 224.)

(3) Classification of obligations according to their legal effects.

Obligations of conscience, natural obligations and civil obligations.

If we use the term "obligation" in its strict and proper sense, the legal effect of every obligation is to give to the creditor a right of action to enforce it. He has not, it is true, in every case the right to compel his debtor to perform literally what he has promised. He is obliged in some cases to be satisfied with obtaining a judgment ordering the debtor to pay damages. But in every obligation, properly so called, the debtor is subject to a legal sanction.

This compulsion is implied in the very notion of an obligation. Notwithstanding this fact there are duties to which the term obligation is applied in a looser sense. (See on this subject generally, Charmont, J., *La renaissance du droit naturel*, Paris, 1910; Planiol, M., *Assimilation progressive de l'obligation naturelle et du devoir moral*, *Revue Critique*, 1913, p. 152; Perreau, E. H., *Les obligations de conscience devant les tribunaux*, *Revue Trimestrielle*, 1913, p. 503.)

We may say in popular language, that we are under an obligation to assist the poor, to relieve the sick, and to perform a multitude of moral duties. These moral duties which are not enforced by law are called by the older writers "imperfect obligations." (See, e.g., Pothier, *Obligations*, n. 1, and n. 197.)

But, besides these duties which we owe to all the world, there are duties which we owe to particular individuals between whom and us there exists some definite relation, although the duty is not one which is enforceable by an action. And in some of these cases also the law sees only a moral duty, or, as it is often called, an *obligation de conscience*. (See Aubry et Rau, 5th ed. 4, p. 5, note 3; *Trib. de l'Empire Allemand*, 16 oct. 1891, D. 93. 2. 115; D. N. C. C. art. 1131, nos. 37 seq.) But there are other cases in which the law holds that there is more than a moral duty; there is a natural obligation. For example, if I

I owe you L. E. 1,000 and I have given you a promissory note for that amount, but you have allowed the note to prescribe, I am not legally bound to pay you L. E. 1,000, but, morally speaking, I owe it to you, and my moral debt to you is of a more precise and definite character than, say, my duty to be charitable to the poor.

Or, if I have made an agreement with you but the agreement has not been put in the form which the law requires, or the writing in which it was contained has been lost, my moral duty to you is again of a very definite kind. To certain of these definite moral duties, of which the examples just given are merely illustrations, the French law applies the term natural obligations. The French Code states only one effect of natural obligations, viz., that a person who has paid a natural obligation has no action of repetition for what he has paid. He is not allowed to plead that he has paid money which was not due. (C. C. F. 1235.) In the Egyptian Codes the term natural obligation is not found at all.

But in dealing with the subject of the liability to repay something which has been received though it was not due to the payee, there is an article obviously founded upon C. C. F. 1235. This article is in the following terms:—

Nevertheless, if a payment is voluntarily made in discharge of an obligation, restitution is not due even where such obligation is not enforceable by law. (147/208.)

The French version of the Egyptian Codes uses here the expression *devoir non sanctionné par la loi*.

Neither the English nor the French translation is as full as the Arabic version.

The literal translation of the Arabic is *Nevertheless, he who willingly gives anything to another in payment of a debt thinking himself bound to pay though the law does not enforce it, has not the right to recover it*. It has been suggested that by avoiding the term "natural obligation" the Egyptian legislator intended that no distinction should be made between a moral duty and what is called in the French law a natural obligation. In every case in which a payment has been made the court is to refuse to order restitution of the payment if, in its opinion, there was a moral duty to make the payment. But this is, probably, not a correct interpretation of the Egyptian Code. It uses in this article the term "obligation," and a moral duty is not in itself an obligation at all in any legal sense. It is true as we

have seen that such duties have been designated by some writers by the name of "imperfect obligations." (Pothier, *Oblig.* n. 1, and n. 197.) But this unfortunate expression is one of the causes of the obscurity which surrounds the whole subject of natural obligations.

Pothier and the writers who use the term imperfect obligations are careful to point out that they are moral duties which lie altogether out of the legal sphere. The law does not enforce them nor does it recognise their existence in any way. To the lawyer as such they are invisible. The natural obligation on the other hand is an obligation which is recognised by the law as producing certain important effects, although it lacks the most characteristic feature of a civil obligation, namely, that of being enforceable by an action. It is more likely, therefore, that the Egyptian Code when it speaks of an "obligation not enforceable by law" means a natural obligation in the sense of the French law.

What is a natural obligation in the sense of the French law.

Seeing that the French Code gives no definition, and states merely one effect of natural obligations, viz., that their existence destroys the right of repetition, we have to discover the meaning of a natural obligation by reference to the history of the French law and to the jurisprudence.

Unfortunately, there are many differences of opinion among the authorities ancient and modern, and the subject is one of the most obscure parts of the French law. (See, especially, Perreau, E. H., *Obligations de Conscience*, Rev. Trim. 1913, p. 593; B.-L. et Barde, 2, nos. 1652 seq.; Aubry et Rau, 5th ed. 4, p. 3; Beudant, *Contrats*, nos. 546 seq.) There is no doubt that the conception of a natural obligation was taken by the French law from the Roman law.

Roman law.

It was from the Roman law that the French law took the idea of a natural obligation as a debt which could not be sued for but which the law would recognise if the debtor chose to recognise it himself. There was more than a duty, there was a debt, and although its payment was not enforceable by an action, yet, if the debtor chose to pay it, it was a genuine payment and not an act of liberality.

Some of the most important applications of this principle in

the Roman law depended on the peculiar institutions of Roman society, and could have no direct bearing on the old French law after these institutions had passed away. In the Roman law it was mainly in regard to the obligations of slaves that the theory of natural obligations was worked out. A slave, having no civil status, could not make a civil obligation either with his master or with a third person. But the slave was said to be naturally bound, and if he subsequently became a free man and paid the debt it was a payment and not a gift. (Dig. 44. 7. 14.) Similarly, a *filiusfamilias*, though he had a civil status and could make contracts with third parties, could not, apart from the case of *peculium castrense*, make a contract with his *paterfamilias*, or at least such a contract gave no rights of action. But here too, though there was not a civil debt, there was a natural debt. (See Girard, *Manuel*, 5th ed., p. 641; Buckland, W. W., *Roman Law of Slavery*, p. 683; Dig. 49. 17. 15.)

Besides these cases, which may be regarded as the primary ones, the Roman law recognised another group of natural obligations upon analogous grounds. There were certain cases in which a person of full capacity who had made a contract was by some special provision of law excused from performance of his obligation and given a legal defence to an action upon it. Thus, by the *Senatusconsultum Macedonianum* a *filiusfamilias* who had borrowed money could not be compelled by law to repay the loan, subject to certain exceptions which do not need to be considered here, but if the *filiusfamilias* paid the debt after he had become a *paterfamilias* there was no right of repetition. (D. 12. 6. 40, pr.; Girard, *Manuel*, 5th ed. p. 519.) And if a minor, i.e., a person above the age of pupillarity but under twenty-five, made a contract without the consent of his curator and got his contract set aside by a *restitutio in integrum* he remained naturally liable. Further, in the Roman law there was, according to some authorities a third group of natural obligations of a kind sometimes called civil obligations degenerated, that is obligations which had been enforceable originally, but by reason of some provision of law had ceased to be so. Such were, for example, the case where a debtor who had not paid his debt was no longer legally bound to pay it because he had acquired the defence of prescription, or because he had obtained a judgment finding upon some technical ground that he was not liable. (See Girard, *Manuel de Droit Romain*, 5th ed. p. 641; B.-L. et Barde, 2, n. 1653.)

Definition of Pothier.

Pothier defines a natural obligation in these terms:—

On appelle l'obligation naturelle celle qui dans le for de l'honneur et de la conscience, oblige celui qui l'a contractée à l'accomplissement de ce qui y est contenu. (Oblig. n. 173.) And, in another passage, he makes it clear that in his view natural obligations are not to be confounded with moral duties, of which latter he says *celles-ci ne donnent aucun droit à personne contre nous, même dans le for de la conscience.* (Ib. n. 197.)

The French codifiers intended to import into the code the same distinction between natural obligations and moral duties. (See Loaré, XII, p. 313, n. 3; B.-L. et Barde, 2, n. 1655.) And it would seem that the Egyptian codifiers meant to retain the same distinction though the use of the word *devoir* in the French version of C. C. E. 147 affords some ground for an argument to the contrary.

Abolition of natural obligations in recent codes.

Some of the most modern codes substitute for the old idea of a natural obligation in the traditional sense the more vague conception of a moral duty. (Code Fédéral Suisse, *Oblig.* art. 63; German Code, art. 814.)

In the French law also, it must be admitted that the line of division between moral duties and natural obligations is becoming very shadowy. We must not forget that the theory of natural obligations is in France mainly the work of the courts.

The Code explains nothing about it, and the tendency of the jurisprudence is to hold that every moral duty to a particular person is a natural obligation. The general duty of charity, one's duty to one's neighbour in general, is not a natural obligation, but when the duty is to a definite person and the debtor who owes the duty recognises it by paying his debt, why should we hesitate to say that he pays a natural obligation?

The moment the debtor regards himself as paying a debt of honour and conscience he is making a payment, and not a gift, why then should the law require more to exclude repetition? The law as laid down in the French cases has not quite reached this point, but it is not far from it. (See Planiol, in *Rev. Crit.* 1913, p. 161.)

Conditions of a natural obligation.

These are three: (1) There must be a *lien de droit* between the parties: there must be, that is to say, an obligation, a debtor and a creditor; (2) This obligation is not enforceable by an action; (3) The debtor is, nevertheless, bound in conscience to discharge it. It is only when these conditions are present that we can speak of the payment of a natural obligation as distinguished from an act of liberality.

Classification of natural obligations in the French law.

(a) Degenerate civil obligations.

In these cases there was at first a valid civil obligation, but owing to some provision of the law, it has ceased to be enforceable by action. When a person actually capable of contract, but enjoying by law a right of rescission, has freely given his consent to a contract and has afterwards got the contract rescinded on the ground of his legal incapacity he remains naturally bound. So, by the French law, a minor may get his contract rescinded on the ground of lesion, though he was at the time of the contract within a month of his majority and knew perfectly well what he was doing. The Mohammedan law as to contracts made by minors is different. (*Statut Personnel*, nos. 528 *seq.*)

3 A person interdicted for insanity may get his contract set aside though it happens that he made it during a lucid interval when he was perfectly sane. But in either of these cases if the debtor chooses to pay the debt, it is a payment which he makes and not a present. (Pothier, *Oblig.* n. 195; B.-L. et Barde, 2, n. 1660; B.-L. et Wahl, *Contrats Aléatoires*, n. 946; *infra*, 2, p. 448.)

4 A creditor to whom a debt is due brings an action to recover it, but for want of sufficient evidence is unable to prove his claim. Perhaps he tenders the decisive oath to his debtor and he denies the debt. Judgment is given for the defendant, but the debtor remains naturally bound. 5 The same principle applies in the case in which the right of action has been lost by prescription, or to that where a trader has made a *concordat* with his creditors under which they are entitled to receive only a certain percentage of their claims. (See C. A. Alex. 15 avril, 1880, Borelli, art. 208, not reported.) In all these cases, as a matter of fact, the debt has not been paid, but the civil obligation has been extinguished by a special provision of law. The law has to proceed on presumptions which are

generally but not always in accordance with the facts. In the majority of cases in which the creditor cannot prove his debt or has allowed the prescriptive period to elapse without suing for it, this is because no debt ever existed, or because it has been paid. But if this presumption does not really correspond with the facts the debtor is escaping his liability by a technicality of the law. He remains bound in honour to pay the debt, and if he recognises this duty it is not an act of liberality but a payment which he makes. (Aubry et Rau, 5th ed. 4, p. 8; Pothier, *Oblig.* n. 196. As to the case of the *concordat*, Aubry et Rau, *ib.* p. 9; Cass. 29 janv. 1900, D. 1900. 1. 200.)

Another illustration of a natural obligation surviving a civil obligation is found in a decision by the court of Limoges. The court held that though the civil obligation by a daughter-in-law to make an alimentary provision for her mother-in-law terminates if the mother-in-law has married again, yet there is a natural obligation which survives. (Limoges, 17 nov. 1896, D. 97. 2. 463. Cf. C. C. F. 206. See *Mohammedan Personal Law*, s. 410.)

(b) Obligations which are natural from the first.

In the preceding group of cases we have examples of natural obligations which survive after the civil obligation has been extinguished. We have now to consider the cases in which the law recognises the existence of a natural obligation which belonged to that category from its inception and has never been at any time enforceable by action.

There are a number of illustrations of natural obligations belonging to this group, according to the French jurisprudence and to the opinions of some of the French commentators, but there is hardly one of them in regard to which there is not more or less dispute. They may be divided as follows: (1) obligations which are null but are not prohibited as contrary to morality; (2) natural obligations arising from status; (3) natural obligations to give a remuneration or to compensate another for losses.

The law in certain cases prescribes that a juridical act shall be clothed in a particular form, and that if it is not put in this form there shall be no civil obligation. Such a requirement of special formalities may be prescribed as a means of preserving the best evidence that consent was freely given, and in order to prevent the use of undue influence, but the prescription of the form is not

based upon moral grounds but merely on grounds of general convenience. A gift, for example, needs to be made by an official instrument, and is not enforceable unless so made. (C. C. E. 48/70; C. C. F. 931.)

But if a gift is made by a private document and is accepted, and the donor dies before the performance of the gift, and his heirs consider themselves bound by the wish of their author and execute the gift, can they claim it back again as a payment which was not due, or is it to be considered that they were naturally bound to respect their author's intentions? In other words, are the heirs to be considered as paying a debt or as making a gift on their own account? The French Code has an article which says "The confirmation or ratification, or voluntary execution of a gift by the heirs or representatives of the donor after his death involves their renunciation of their right to set up defects of form or any other defence." (C. C. F. 1340.)

And, according to many French authorities, this provision of the code is based upon the fact that the heirs are bound by a natural obligation. (Planiol, 2, n. 342; Beudant, *Contrats*, p. 335; Aubry et Rau, 5th ed. 4, p. 7.) But other writers argue that there can be no natural obligation of the heirs if there was no natural obligation on the part of the donor himself, and that the language of the French Code in article 1339 is inconsistent with a natural obligation on his part. (B.-L. et Barde, 2, n. 1667.)

Le donateur ne peut réparer par aucun acte confirmatif les vices d'une donation entre vifs; nulle en la forme il faut qu'elle soit refaite en la forme légale (C. C. F. 1339).

The Egyptian Codes are silent on this matter, and it is submitted that there is a natural obligation on the part of the donor himself to fulfil his promise, and, if he dies, on the part of his heirs. (See D. N. C. C. art. 1235, n. 63.) A similar question arises in regard to wills which are null in point of form.

(3) If the testator has expressed a wish that part of his property should go to a certain person, though the wish has not been made in the form of a will are his heirs under a natural obligation to carry out the declared desire of the testator? Most of the French writers answer this question in the affirmative, and the jurisprudence appears to be settled in this sense. (Aubry et Rau, *loc. cit.*; Cass. 19 déc. 1860, S. 61. 1. 370; Journal du Palais, 1861, p. 321; Besançon, 6 déc. 1905, D. 1908. 2. 330; Trib. de l'Empire d'Allemagne, 9 oct. 1894, S. 96, 4. 6; Cass. 10 janv. 1905,

S. 1905, I. 128; Perreau, E. H. in Rev. Trim. 1913, p. 520. *Contra*, B.-L. et Barde, 2, n. 1667.)

Contract declared null on grounds of morality creates no natural obligation.

When the law prohibits a certain contract upon grounds of morality it is clear that there can be no moral duty any more than any legal duty to fulfil it. (An undertaking, for example, to pay money to another in order to induce him to commit a crime is a contract contrary to morality which cannot be enforced by an action: and there is certainly no natural obligation on the part of the promisor to fulfil his promise. Similarly, when the law prohibits the stipulation of interest above a certain rate, as, for instance, in Egypt above nine per cent., this is a prohibition based upon moral grounds and to prevent usury. (C. C. E. 125/185.) The borrower who has promised to pay more than the legal rate is not bound by a natural obligation any more than by a civil obligation. (Beudant, *Contrats*, n. 562.) The French law on the subject expressly allows repetition of what has been paid, but this provision appears to be declaratory, that is, the law upon this point would have been the same if the legislation had not been enacted. (*Loi* 19 déc. 1850, art. 1. See Planiol, 2, n. 342; Aubry et Rau, 5th ed. 4, p. 13.)

Do gaming contracts create natural obligations?

This is an extremely controversial question in France.

The French Code expressly denies an action for the recovery of a gaming debt or a bet, but it provides that if such a debt has been voluntarily paid without fraud the loser cannot recover what he has paid. (C. C. F. 1965, 1967.)

According to one view this is because the gaming debt is regarded by the law as a natural obligation. (B.-L. et Wahl, *Contrats Aléatoires*, 3rd ed. n. 85.) The Italian jurisprudence is in this sense. (Cass. Rome, 15 oct. 1898, S. 99, 4. 37.) The denial of the right to repetition is merely a statement of the general rule applicable to natural obligations. But according to another opinion for which there is a good deal of support, the denial of the right to repetition rests in this case upon another ground. The law regards gaming debts with the utmost disapprobation. The cause of such an obligation is immoral to such an extent that the law will not allow the courts to entertain an

action based upon a gaming debt either to enforce its payment or to recover what has been paid. The law refuses its assistance to either of the parties, the turpitude of both of them being the same. (See authorities cited in B.-L. et Wahl, *l.c.*; Planiol, 2, n. 2110; D. N. C. C. art. 1965, n. 18; Aix, 14 mai 1908, S. 1908, 2, 291. Cf. Perreau, E. H. in Rev. Trim. 1913, p. 555.)

It rather appears from the *travaux préparatoires* that this was the theory of the French codifiers. *La loi civile doit seulement le dédaigner (le jeu), le méconnaître, lui refuser son appui.* (See Locré, XV, pp. 196—200, nos. 4 and 5.) And it is generally agreed in France even by those writers who hold that gaming debts produce natural obligations that they are not natural obligations of the same class as others.

It is because gaming debts are regarded as having an unlawful cause that, according to the French law, which has been followed in Egypt, they cannot be the subject of novation or ratification. (Aubry et Rau, 4th ed. 4, p. 575; B.-L. et Wahl, *Contrats Aléatoires*, n. 102; Req. 21 avril 1885, D. 85. 1. 275; C. A. Alex. 1902, B. L. J. XIV, 134. So, Code Port. art. 1542.)

3 Nor can such an obligation support an accessory obligation. It cannot be secured by a surety. (B.-L. et Wahl, n. 139; D. N. C. C. art. 1967, n. 170.) A pledge given to secure a gaming debt is not valid, and the loser can revindicate the objects which he has handed over by way of pledge. (B.-L. et Wahl, *op. cit.* n. 142; Aubry et Rau, 4th ed. 4, p. 578; D. N. C. C. art. 1967, n. 121.)

There was in the French law much controversy upon the point whether the buying of shares "on margin"—*marchés à terme*—is to be considered a gaming contract and the *loi du 28 mars 1885* declared such contracts to be lawful. This subject belongs to the commercial law. (See D. N. C. C. *Appendice à l'art.* 1965; Lyon-Caen et Renault, *Traité de Droit Commercial*, 3rd ed. 4, n. 974; Req. 24 nov. 1909, D. 1911. 1. 129.) And in Egypt such contracts are declared to be lawful and valid by the *Décrets* nos. 23 and 24 of 1909, now embodied in the Egyptian Codes of Commerce. (C. Comm. E. 73/79.)

Bills and notes granted to secure gaming debts.

4 If a bill granted in payment of a gaming debt comes into the hands of a holder in good faith it is generally agreed in France that the holder can sue the persons liable on the bill and cannot be met by the defence that the bill was granted for an unlawful

cause. (B.-L. et Wahl, *op. cit.* n. 122; Paris, 27 juill. 1896, D. 97. 2. 122; D. N. C. C. art. 1967, n. 46.)

The loser of the bet who has given such a bill to the other party can set up the defence against him or against any third holder who knows the origin of the bill, but out of favour to commerce innocent third parties must be protected. (B.-L. et Wahl, *Contrats Aléatoires*, n. 118, 122; Cass. 12 avril, 1854, D. 54. 1. 180; D. N. C. C. art. 1967, n. 52.)

Egyptian law. 307-308

The Egyptian Civil Codes are silent as to gaming contracts, but by the Penal Code it is a crime to keep a public gaming house or to institute a public lottery without authorisation not being a lottery for a purely charitable purpose. (Arts. 307, 308/316, 317; *Draft Penal Code*, 273.)

According to the Mixed jurisprudence a gaming debt is not exigible *selon la règle d'équité et de droit naturel consacrée par la plupart des législations positives*. (C. A. Alex. 25 janv. 1897, B. L. J. IX. 194; Cf. C. A. Alex. 28 mars 1878, R. O. III. 167; C. A. 18 avril 1911, O. B. 12, n. 85; Req. 15 mars 1911, D. 1911. 1. 382.) And it was held by the Mixed Court of Appeals in a case before the law of 1909 above referred to, that even when stock exchange operations were of such a character as to be mere *jeux de bourse* the duty to pay such a gaming debt was a natural obligation, and, therefore, if it had been paid there was no right to repetition. (C. A. Alex. 6 janv. 1903, B. L. J. XV, 79.) But it has likewise been held in accordance with the French jurisprudence above referred to that a gaming debt if it is to be considered as a natural obligation, nevertheless differs from other natural obligations inasmuch as it cannot be ratified or novated so as to make it a civil obligation. (C. A. Alex. 1902, B. L. J. XIV, 134.)

Repetition refused under most foreign laws.

The rule that the loser of a bet cannot recover what he has paid is found in many countries. (Germany, German Code, art. 762; Austria, Cour Sup. Autrich., 14 December 1898, S. 1900. 4. 21; Switzerland, Code Féd. Oblig. arts. 513, 514; Belgium Bruxelles, 13 mars 1895, Pasierisic Belge, 92. 2. 216; Portugal, Code Port. art. 1542; Spain, Code Esp. art. 1798; England, 8 & 9 Vict. c. 109, s. 18.)

By Egyptian law is there repetition of sums paid on gaming contracts?

According to the most recent decision of the Native Court of Appeal the court will not order restitution of what has been paid on an unlawful contract. It will give no assistance to either of the parties, but will leave matters as they are. (C. A. 18 April 1911, O. B. XII, n. 85; *Contra*, Trib. Caïre, 5 juin 1901, O. B. III. n. 85. See *infra*, p. 178.)

If this principle is sound it makes no difference whether we regard a gaming debt as a natural obligation or as a debt due upon an unlawful contract. There is no repetition in either case.

On the other hand, as we shall see later, the modern French jurisprudence allows repetition of money paid for an unlawful cause where the obligation is merely prohibited by the law, but refuses repetition when the obligation is both unlawful and immoral. (See Planiol, 2, n. 846, Req. 4 janvier 1897, D. 97. 1. 126; Req. 15 mars 1911, D. 1911. 1. 382. *Infra*, p. 178.)

If the Egyptian courts were to follow this jurisprudence as is quite possible, in spite of the decision just cited, it would seem that they would be bound to allow repetition of what had been paid on a gaming contract, seeing that such a contract is not immoral in the strict sense of the term, and that there is no article in the Egyptian Code as there is in the French Code to exclude repetition in the special case of gambling debts.

X Gaming contracts in English law.

The old rule of the common law was that wagering contracts were valid unless the subject-matter of the contract was illegal or immoral, or unless there was a ground of public policy upon which the wager was held to be void as having a tendency to produce a public mischief or inconvenience.

Examples of this last kind were a wager upon the sex of a third person (*Da Costa v. Jones*, 1778, 2 Cowper, 729); and a bet founded on the probability that Napoleon would be assassinated. (*Gilbert v. Sykes*, 1812, 16 East, 150, 14 R. R. 327.)

But gaming contracts are, as regards the civil remedies, now regulated in England by the Gaming Acts of 1845 (8 & 9 Vict. c. 109) and 1892 (55 & 56 Vict. c. 9), and by the Gaming Securities Act, 1835 (5 & 6 Will. IV. c. 41).

(See Halsbury, *Laws of England*, vo. Gaming and Wagering; Pollock, *Contracts*, 8th ed. p. 313; and, as to the Gaming Secu-

rities Act, *Nicholls v. Evans*, 1914, 1 K. B. 118, 83 L. J. K. B. 301, and article by W. J. Byles in *Journal of Society of Comparative Legislation*, 1916, v. 16, p. 146.

The English law now is that all contracts by way of gaming and wagering are void.

No action can be brought to recover what is won.

When a stake has been deposited with one party or with a stakeholder the depositor can recover it either before or after the event if it has not been handed over to the winner in payment. (*Hampden v. Walsh*, 1876, 1 Q. B. D. 189, 45 L. J. Q. B. 238.)

But when, after the event, the loser or the stakeholder, as the case may be, has paid over the amount of the bet to the winner no action lies for its recovery.

There is an exception as to stakes deposited with the owner of a betting-house.

Securities, such as bills, given for gaming contracts are illegal, and although innocent holders of such securities are protected, the drawer of such a bill, if called upon to pay it, may recover the amount from the person to whom he originally gave the instrument. (*Nicholls v. Evans*, *ut supra*.)

(c) Natural obligations arising from status.

In some cases civil obligations arise from status, as, for example, the obligation to make an alimentary provision. (C. C. E. 155-157 217-220; C. C. F. 205, *seq.*)

But this obligation is strictly limited by the law. There is not, for example, any civil obligation on a brother to make an alimentary provision for his sister.

But is there a natural obligation to support near relations although they are not among those to whom the law gives a legal claim? Most French authorities answer this question in the affirmative, and the jurisprudence is in this sense. (Aubry et Rau, 5th ed. 4, p. 8; Limoges, 17 nov. 1896, D. 97. 2. 463; Dijon, 20 juill. 1904, D. 1907. 2. 181.)

The French jurisprudence appears to be settled that if the father of an illegitimate child, whose paternity has not been recognised, promises to pay a sum of money or to make an alimentary provision for the child or for its mother, this is not a gift, but the fulfilment of a natural obligation. (Dijon, 20 juill. 1904, *ut supra*. See *infra*, p. 115. Cf. C. A. Alex. 24 déc. 1902, B. L. J. XV, 75.) It appears to be in accordance with the

traditional principles of the French law to find that a natural obligation exists to support near relations, but this is disputed by many French writers. They maintain that the code enumerates the cases in which the duty to make an alimentary provision exists and that outside these cases there is at most only a moral duty. Moreover, if we accept the other view where are we to draw the line? Each court would be free to adopt its own view as to how far the duty extended. It is further argued that the rules requiring certain forms for gifts are made to prevent the use of undue influence or violence.

The risk of undue influence or violence is especially great when parties are closely related to one another, and it would be dangerous to sustain gifts made without observance of the legal forms upon the ground that they were not to be regarded as mere acts of liberality, but as the fulfilment of a natural obligation. (Colmet de Santerre, 5, n. 174, *bis* X.; Laurent, 17, n. 16; B.-L. et Barde, 2, n. 1664, and n. 1666.)

Natural obligation to provide a dowry.

What is a natural obligation may depend upon the social ideas and traditions of a particular country. In France and in some other countries, the duty of a father to provide a dowry for his daughter is, according to many authorities, a natural obligation. (Aubry et Rau, 5th ed. 4, p. 7; Colin et Capitant, 3, p. 47; Pau, 25 juin 1806, D. N. C. C. art. 513, n. 347. *Contra*, Montpellier, 16 déc. 1901, D. 1907. 2. 241.) The Mixed Court of Appeal has applied this view and held that a *dot* made by a Brazilian parent was not a donation. (C. A. Alex. 26 avril 1917, B. L. J. XXIX, 387.)

The French *doctrine* is mostly in the opposite sense. Apart from the difficulty in finding a natural obligation in a duty so vague, ~~for~~ how is the amount to be determined?—the view of Aubry and Rau is not easy to reconcile with the language of C. C. F. 1422, al. 1, which implies that such a provision is an *acte à titre gratuit*. (B.-L. et Barde, 2, n. 1663. As to the question if it can be challenged by creditors as a gratuitous alienation, see *infra*, 2, p. 116.)

(d) Natural obligation to pay a remuneration for services received or to compensate for losses.

There are many cases in which services have been rendered in such circumstances as to give no legal claim for remuneration,
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and there are other cases in which one man has caused loss to another without having been guilty of any fault. If the person benefited gives something to the other this is presumably a remuneration for services rendered. It is not a gift, he has received a *quid pro quo*. And, in like manner, if a person who has been the innocent means of causing an injury to another makes a payment to him, this is to be regarded as compensation and not as a gift.

In both cases the payment is the fulfilment of a natural obligation.

The services may be rendered by a person who was not bound by contract at all.

If a servant or a mandatary shows exceptional zeal or ability and the employer or mandator pays him more than he was legally entitled to, this is a remuneration. If a man saves me from drowning he can claim only his expenses and losses, but if I choose to give him a sum of money in addition, this is a payment and not a donation.

A woman who out of kindness nurses a sick neighbour, a niece who acts as housekeeper for her uncle without receiving any wages, a doctor who shows special attention to his patient, may be taken as examples of persons having a natural claim to remuneration. These principles are generally accepted by the French authorities. (B.-L. et Barde, 2, n. 1665; Planiol, 2, n. 345; *infra*, 2, p. 182. Cf. the English and American cases in Keener, *Quasi-Contracts*, p. 315.) According to some writers we must distinguish: the services rendered must be of a kind for which it is customary to pay—*qui se rendent communément à prix d'argent* to use the expression of Aubry and Rau. (4, p. 8. See Riou, 15 févr. 1894, joint à Req. 3 déc. 1895, S. 97. I. 234, D. 96. I. 284.) It has been held both in France and in Egypt that a man who promises to pay a sum of money to a mistress at the end of a long period of concubinage is making a compensation for an injury which he has done though the woman had no legal claim against him. (Rennes, 7 mars 1904, S. 1907. 2. 241; D. Supp. *Obligations*, n. 183; C. A. 13 juin 1909, O. B. XI, n. 3. See *infra*, p. 115.)

In the Egyptian case just cited the court held that it was entitled to modify the terms of the promise and to award a smaller sum than that which had been named in it.

This is in accordance with the French jurisprudence. If the sum promised is excessive and beyond what the promisor was

under a natural obligation to pay the courts may reduce it to that extent. (Caen, 10 juill., 1854, D. 55. 2. 162; *Pand. Franç. Oblig.* n. 7711.)

Effects of natural obligations.

The only effect mentioned in the codes is that repetition of what has been paid is excluded, but the code does not say that this is the only effect of a natural obligation, and it is generally agreed that a natural obligation produces other effects as well. The effects may be thus stated: (1) Discharge of the obligation is a payment and therefore does not need to be made in the form of a gift; (2) The act being a payment "in discharge of an obligation" restitution is not due, but the payment does not change the character of the obligation. It does not convert it into a civil obligation. Consequently, if the creditor is subsequently evicted from a thing given in payment of a natural obligation he will have no action in warranty against the debtor. (Démolombe, 27, n. 50.)

(3) It follows, further, from the same principle that the part-payment of a natural obligation does not operate as a confirmation in the sense of making the debt a civil obligation and thereby giving the creditor the right to enforce payment of the balance. (Aubry et Rau, 5th ed. 4, p. 12; *Pand. Franç. Obligations*, n. 120.) The debtor may, as will be explained later, make a novation of the natural debt into a civil one, but a part-payment is not equivalent to such a novation unless it is accompanied by a declaration to that effect. And, lastly, according to the French law, in order to exclude repetition the payment must be "voluntarily" made, and by a "voluntary" payment the code means a payment made by the debtor not merely without any constraint or fraud but with the full knowledge that he is paying a debt which he cannot be compelled to pay. For, it is only in these circumstances that the payment can be regarded as an acknowledgment by him of the existence of the natural obligation. According to the principle, the natural obligation only becomes a legal debt if the debtor chooses to recognise it as such. If he were to pay a natural debt in the mistaken belief that he was civilly bound he would be entitled to repetition, because he had shown no intention voluntarily to discharge a natural obligation. (Aubry et Rau, 4th ed. 4, p. 729; Beudant, *Contrats*, p. 338; B.-L. et Barde, 2, n. 1674.)

The Roman law, on the other hand, excluded repetition in this

case. There was error but there was a debt. (Dig. 12. 6. 26. 12; Vangerow, *Pandekten*, 7th ed. 3, p. 392.)

(4) A natural obligation may serve as the cause of a civil obligation, that is, it is capable of being converted by novation into a civil obligation, or it may serve as the principal obligation which may be secured by an accessory obligation, such as that of a surety. These two cases may be considered separately.

Natural obligation can be novated.

Seeing that the debtor in the natural obligation has the choice whether he will recognise the debt or not, but if he does recognise it, the law will recognise it also, it seems clear that if he desires to substitute for it a civil obligation this will be no less an acknowledgment by him of his liability than if he were to pay the debt.

Novation implies the existence of an old debt for which the new one is substituted. If the debtor instead of paying the natural debt enters into a new engagement to pay it, as, for example, by signing a promissory note for the amount due, this is not a donation. (Aubry et Rau, 5th ed. 4, p. 11; B.-L. et Barde, 2, n. 1678.) Laurent denies this and argues that a natural obligation has no existence in the eye of the law except when there is a voluntary payment of it. Unless and until the debtor chooses to pay it there is no debt at all, and, consequently, it cannot be novated or secured by an accessory obligation. (Laurent, 17, nos. 28, 29.) But this reasoning does not appear to be sound. The code does not say that payment is the only manner in which the debtor can recognise his liability. There seems to be no ground for laying down a rule so unreasonable. If there is a debt, although it be only a natural debt, and the debtor chooses to turn it into a civil obligation, why should this be regarded as a donation?

The codes clearly recognise that a natural obligation is a debt for, otherwise, there could be no payment.

And this argument is confirmed by the provision of the code as to suretyship. A surety may validly bind himself to secure an obligation entered into by a debtor who does not possess legal capacity. The debtor can get his own obligation annulled, but the surety is bound. (C. C. F. 2012; C. C. E. 496/605. See Paris, 16 nov. 1892, D. 93. 2. 227.) How can this be explained except upon the theory that the incapable debtor, for example, a minor, who has got his obligation annulled, remains bound by

a natural obligation? There must be some obligation subsisting to support the accessory obligation of the surety. The Civil Code of Quebec says expressly that suretyship may be "for the fulfilment of an obligation which is purely natural." (C. C. Q. 1932.)

So it has been held by the Mixed Court of Appeal: *l'obligation civile, ne serait-elle que la sanction d'une obligation naturelle, qu'elle n'en serait pas moins valable et obligatoire pour celui qui s'est obligé envers celui qui a donné son acceptation.* (C. A. Alex. 17 janv. 1918, B. L. J. XXX, 162.)

Proof of novation.

The intention to novate is not presumed. If the debtor in the obligation acknowledges the debt and promises to pay it, for example, by a private writing, is this to be regarded as an acknowledgment by him that he is under a natural obligation or as expressing his intention to make the debt civilly binding? According to some French decisions a promise by the debtor to pay the debt made with the knowledge that it is merely a natural debt makes it civilly binding. (Toulouse, 5 avril 1892, S. 92. 2. 155, D. 92. 2. 568.)

For why should the debtor acknowledge his liability if he still intends to reserve to himself the choice of paying the debtor or not? If he intends to remain only naturally bound is it not to be expected that he should say so?

But the sound view appears to be that a mere acknowledgment by the debtor is not in itself enough to turn the natural debt into a civil one. We must give effect to the rule that novation is not presumed—*confirmatio nil dat novi*. There will be no novation unless from the terms of the acknowledgment taken in connection with the circumstances of the case, the intention to novate is manifested (Aubry et Rau, 5th ed. 4, p. 12; B.-L. et Barde, 2, n. 1678; Perreau, E. H. in Rev. Trim. 1913, p. 534; Colmar, 31 déc. 1850, D. 53. 2. 164; Douai, 6 août 1856, D. 56. 2. 295; Nancy, 21 juin 1902, S. 1903. 2. 34; Amiens, 12 mai 1903, D. 1904. 2. 439; D. N. C. C. art. 1235, n. 96 seq. Cf. *Trib. de l'Empire d'Allemagne*, 16 oct. 1891, D. 93. 2. 115; Note by M. Naquet to Cass. 23 juin 1908, S. 1911. 1. 243, col. 2.) But the signing of a bill or promissory note to pay a natural obligation sufficiently indicates the intention to novate and to make the debt a civil one. (Trib. Belley, 6 févr. 1856, D. 56. 3. 21; Poitiers, 2 juillet 1872, S. 73. 2. 112. Journal du Palais, 1873, p. 474.)

Natural obligation may be secured by suretyships and real securities.

For similar reasons, a natural obligation is sufficient to support the accessory obligation of a surety or to serve as the cause of an obligation of pledge or hypothec contracted by the debtor. (B.-L. et de Loynes, *Privilèges et Hypothèques*, 2, n. 1280; B.-L. et Barde, 2, n. 1677; Beudant, *Contrats*, p. 339. *Contra*, Laurent, 17, n. 28; Aubry et Rau, 5th ed. 4, p. 12. See *infra*, p. 100.)

Exception as to gaming contracts.

It has already been explained in speaking of gaming contracts, that according to the jurisprudence, a gaming contract, if it is a natural obligation, does not produce all the effects attached to other obligations of that kind. It cannot be novated or secured. (*Supra*, p. 29.)

Compensation.

Natural obligations cannot be set up by way of compensation against civil obligations. The reason for this is that compensation takes place by operation of law independently of the will of the parties. If I owe you L. E. 100 upon a natural obligation, and you become my debtor upon a civil obligation for the same amount, if you could claim that compensation had taken place this would be compelling me to pay my natural debt. It is of the essence of a natural debt that the debtor should be free to refuse to pay if he chooses to do so. (Aubry et Rau, 5th ed. 4, p. 12; B.-L. et Barde, 2, n. 1681.)

Right of retention.

For very similar reasons it is clear that the creditor in a natural obligation does not in any circumstances enjoy a right of retention. This is a right given in particular cases to creditors to refuse to deliver property belonging to the debtor which is in their hands until the debt has been paid. Its purpose is indirectly to compel the payment. Seeing that a natural obligation is essentially unenforceable, it would be illogical to allow to the creditor a right of retention. (B.-L. et Barde, 2, n. 1682. *Contra*, Hue, 7, n. 169. See D. N. C. C. art. 2094, n. 78.)

Doctrines of natural obligations not a part of the English law.

The expression "natural obligation" is unknown to the English law, and the doctrine of the Roman law upon that subject is entirely foreign to the common law of England. Thus a moral obligation is not a valid "consideration" for a promise.

(*Beaumont v. Reeve*, 1846, 8 Q. B. 483, 15 L. J. Q. B. 141, 70 R. R. 552. See *infra*, p. 63, and cases in Leake on *Contracts*, 6th ed. p. 443.)

But in some cases the English law by another route arrives at similar practical solutions to those which the French law derives from the theory of natural obligations.

Thus in the English law if a debt is paid after it has ceased owing to lapse of time to be recoverable by action, it cannot be recovered. But this is because the Statute of Limitations, by which name the law fixing the period of extinctive prescription is designated in England, does not provide that after a certain time the debt shall be extinguished, but merely that thereafter no action can be brought for its recovery. The party who wishes to take advantage of the statute must plead it. So even the executor of a debtor may pay a prescribed debt and charge it against the estate. (*Midgley v. Midgley*, 1893, 3 Ch. 282, 62 L. J. Ch. 905.)

Upon the same principle that there is still a debt although the prescriptive period has elapsed, a part-payment or acknowledgment raises the debt once more to the level of an enforceable claim. (Statute of Frauds Amendment Act, 1828. See cases in Leake, *Contracts*, 6th ed. p. 721.) Further, a mortgage or pledge remains valid though the personal action for the debt is barred by the Statute of Limitations. (*London and Midland Bank v. Mitchell*, 1899, 2 Ch. 161, 68 L. J. Ch. 568. See Leake, *Contracts*, 6th ed. p. 720.) Again, in the English law if money has been paid or property delivered under a contract which is unenforceable because not made in writing as required by law in this case, there is no action for its recovery merely on the ground of the informality. (Pollock, *Contracts*, 8th ed. 694; *infra*, p. 215.)

The rule formerly peculiar to courts of equity but now applied in all the courts, "He who seeks equity must do equity," has the practical effect in some cases of giving recognition to what under the French system would be the natural obligation to pay for an "unjust" enrichment. For example, a person who, believing that

he has a title to possess an immoveable, spends money upon it without the knowledge of the true owner has no claim for reimbursement. But if a person having a title to an estate knows that another who is ignorant of that title is dealing with the property as his own, the real owner when he evicts the other must indemnify him for his expenditure so far as it was necessary and has proved permanently beneficial. (*Neesom v. Clarkson*, 1843. 4 Hare, 97, 62 R. R. 51; *In re Cook's Mortgage*, 1896, 1 Ch. 923, 65 L. J. Ch. 654. See Snell's *Equity*, 17th ed. p. 338.)

Lastly, the English law by implying a contract in certain cases where in truth there never was an agreement, and where the offer or request is a legal fiction, secures the same equitable result as is reached in the French law by less violent means. In some cases where services have been rendered or money paid without any agreement the English law assumes a promise to pay for the services or to restore the money, although, in fact, no such promise was ever made. This matter will be more fully explained later under the head of *Quasi-Contracts* in the English law. (*Infra*, 2, p. 198.)

(4) Classification of obligations according to the modalities by which they are affected.

The French Code deals with contracts before it considers the different kinds of obligations. The Egyptian Code attempts to state in the first place the rules which apply to all obligations, whether they arise from contract or from other sources, and takes up the various sources of obligations afterwards. This arrangement is logically a good one, but it is practically inconvenient. Many of the modalities of obligations, such as conditions and terms, really belong to the law of contract. And although there can be a joint and several liability created without agreement the law of joint and several liability is also most conveniently discussed in connection with contracts. We shall, therefore, in this place merely enumerate the principal modalities of obligations, and defer consideration of them until after we have explained the law of contract and the other sources of obligations.

An obligation is said to be pure and simple when it is normal, that is when it produces the effects which the law gives to ordinary obligations of that class.

But the normal effect of obligations may be modified by the parties or by the law itself in such a way as to give to the obliga-

tion a special character and to cause it to produce different legal effects from an ordinary obligation. In this case the obligation is said to be affected by a modality. For instance, normally speaking, an obligation is instantly exigible. A creditor has the right to enforce payment at once. But the obligation may be subject to a term and the effect of this modality is to suspend the payment. Or again, normally speaking, an obligation is exigible from its date or from the time fixed for payment, but it may be added that it shall not be exigible unless and until a certain thing happens, in which case the obligation is affected by the modality of condition. Normally speaking, an obligation has for its object a single thing,—an act or an abstention,—but the object of the obligation may be two or more acts. And in this case, several positions are possible; the debtor may be bound to perform all the acts so that he can only liberate himself by a performance which comprises all the things promised, as if I promised to deliver my horse and my ox; in which case the obligation is called conjunctive. Or it may be that although there are two things due under the obligation the debtor can liberate himself by performing one of them, in which case the obligation is said to be alternative.

Or, again, there may be to begin with only one thing due, but the debtor has the right if he chooses to substitute a certain other thing. Here the obligation is called facultative. Normally speaking, an obligation is formed between two persons, a creditor and a debtor, but there may be several creditors or several debtors. And when there is a plurality of creditors or debtors it may be that each of the creditors is entitled to his fraction of the debt, and that each of the debtors is bound to pay his fractional share, and this is what is meant by a joint obligation. Or, it may be that each of the creditors can demand payment of the whole debt, or that each of the debtors is individually bound for the whole. In the first case the creditors are said to be joint and several creditors, and in the second case the debtors are said to be joint and several debtors.

Or, still again, normally speaking, when the creditor or the debtor dies and he is represented by several heirs the obligation is divisible, that is, each of the heirs of the creditor is entitled only to a share, and each of the heirs of the debtor is liable only for a share. But it may be that the obligation is indivisible. And besides this case there are some other illustrations of indivisibility which will be explained later. Or, lastly, an obligation may have a penal clause attached to it giving the creditor a right

to claim a definite sum in the event of breach of the contract. All these are examples of modality. The French Code in the chapter headed *des diverses espèces d'obligations*, which is chapter IV. of Book III., treats of these modalities in this order:

- (1) Conditional obligations.
- (2) Obligations with a term.
- (3) Alternative obligations.
- (4) Joint and several obligations.
- (5) Divisible and indivisible obligations.
- (6) Obligations with a penal clause.

The discussion of these modalities is postponed till a later part of this work, but it may be useful to notice here certain distinctions of obligations which do not depend upon modalities. The legal effect of the obligation is not modified and the obligations are normal ones of their type; but, seeing that the right of the creditor is to some extent affected according as the obligation belongs to one or other of these classes these distinctions have to be explained.

Chirographic, privileged and hypothecary obligations.

In the language of the French law an obligation is commonly called chirographic when the creditor has no other right than that which results from the obligation itself. This is because in the old legal language a document of debt which consisted in a private writing was called a *chirographum*. (Planiol, 2, n. 2318; Beudant, *Contrats*, n. 568.) The chirographic creditor is an ordinary creditor whose only security is the general right of pledge which all ordinary creditors have over the whole property of the debtor. If the debtor becomes insolvent the chirographic or ordinary creditors will have to rank after the privileged or hypothecary creditors, and, as among themselves, will receive a dividend in proportion to the amount of their claims.

Chirographic creditors are called in the Egyptian Code "ordinary" creditors. (C. C. E. 554/678.)

An obligation is hypothecary when in virtue of certain formalities, the creditor has "over one or more immoveables belonging to the debtor the right as against third persons to be paid in preference to the ordinary creditors out of the price of such immoveables into whose hands soever they may pass." An obligation is privileged when by reason of its nature the creditor has "the right to obtain payment in preference to all other creditors

out of the value of all or of a specified part of the moveable or immoveable property of the debtor." (C. C. E. 554/678.)

Obligations principal and accessory.

An accessory obligation is one which depends upon another or principal obligation. It cannot come into existence without a principal obligation. The relation between two obligations as principal and accessory respectively may arise in two ways:—(1) When one is the legal consequence of the other. The liability to pay damages for the breach of a contract is in this sense an accessory obligation; (2) when one of the obligations is contracted to secure the payment of the other or principal obligation, such as the penal clause, the obligation of a surety, or the contract of pledge. (C. C. E. 495/604; 540/662.) When the accessory obligation belongs to this second class it follows as a general rule the fortune of the principal obligation, and if the principal obligation is extinguished the accessory obligation necessarily falls to the ground.

But this is not true of accessory obligations which belong to the first group. They may continue to exist although the principal obligation has come to an end. (Aubry et Rau, 5th ed. 4, p. 141.) The plaintiff who has obtained rescission of a contract upon some legal ground may still be entitled to damages. And in one case at least an accessory obligation remains though the principal obligation was null *ab initio*.

When the vendor has sold as his own a determinate object which he knew was not his property and the purchaser has acted in good faith, that is, he believed that he was becoming the owner of the thing by the effect of the contract, the purchaser can claim damages, although the sale is invalid. (C. C. E. 264, 265/333, 334; C. C. F. 1599.)

And, even as regards the second group, the rule that the extinction of the principal obligation extinguishes the accessory obligation also is not without exception. Thus, the rule is that suretyship is void if the obligation to which it applies is void, but there is an exception to this rule. If the contract of suretyship was entered into only by reason of the debtor's want of legal capacity the contract of suretyship is valid though the principal debtor is not bound. (C. C. E. 496/605; C. C. F. 2012. See Paris, 16 nov. 1892, D. 93. 2. 227.) The surety here knows that he is guaranteeing an obligation which the debtor can challenge. The debtor is, for instance, a minor, and the creditor will not

deal with him unless he obtains a surety. If the minor gets his contract set aside the surety is not released. This is apparently upon the theory that the minor or the incapable debtor remains bound by a natural obligation, and that this natural obligation is enough to support the accessory obligation of the surety. (Planiol, 2, n. 2332; B.-L. et Wahl, *Contrats Aléatoires*, n. 946; *supra*, p. 38.)

Obligations liquid and non-liquid.

An obligation is liquid, or, as the Egyptian Codes express it, "for a liquidated amount" (C. C. E. 194/258) when the existence of the debt is certain and the amount due is determined: *cum certum est an et quantum debeatur*. If a man owes a debt for which he has given a promissory note for a certain amount this is a liquid debt. But if he has caused damage to another by his fault the claim against him for damages is a non-liquid debt which is not liquidated until either he has agreed to pay a definite sum which the other accepts in satisfaction of his claim or until a judgment has been obtained against the wrongdoer by which the amount of damages is determined or liquidated. The divisions of obligations not based upon modalities have now been noticed, and the explanation of the modalities will be deferred to a later place. (*Infra*, 2, pp. 328 *seq.*)

CHAPTER II.

PUBLIC POLICY AND CAUSE IN CONTRACTS.

WHEN we say that contracts are enforceable agreements, what we mean is that the law lends its sanction to carry out what the parties have agreed upon. The state places its machinery at the disposal of the man who has made a contract and can prove that the other party to it will not perform what he has promised. If people had to depend upon themselves to secure the performance of contracts, contracts would be of comparatively little value, and a society in which people were left to enforce their agreements if they could by the strong hand or by the principle of self-help, as it is called, would be in a very rude and primitive condition.

When we say that we live in an organised society we mean, as much as anything, that we live in a society which has an efficient machinery to secure the enforcement of contracts, and lends that machinery to the person who has suffered by a breach of contract.

It is in the highest degree in the interest of public policy that this should be so. It is only in this way that ordered government can take the place of violence and lawlessness. But, clearly, if the state is to see to it that contracts shall be enforced, this will only be such contracts as are not against its own interests as a state. We shall not expect it to lend its aid to contracts which tend to the disintegration of the body politic. It may very well enforce contracts which are not just, as between the parties themselves, because the state cannot look minutely into everybody's business, and it is evidently desirable that people should be left to manage their own affairs as far as possible. But when a contract strikes a blow at the health of the body politic itself it would be absurd that the state should be asked to lend its sanction. When the law requires that contracts should have a lawful cause this is a requirement which it makes for the protection of society itself. Moreover, when the law, in the general interest of society, lends its aid to enforce agreements which the parties have made, it assumes that there was something genuine and real for the parties to agree about. It is taken for granted that this is

so until the contrary is proved, but when it is shown that what the parties affect to be dealing about has in fact no existence the law declines to recognise the agreement as serious. It says there is only an apparent cause for the agreement, and we do not enforce agreements unless they have a real cause.

What if the cause is unlawful on one side only.

The bilateral contracts produce obligations by both parties, and it may be that the cause of the obligation of one of the parties was unlawful while the cause of the obligation of the other party was lawful. In such a case does public policy require that neither of the parties should have any right of action upon the contract, or can the law distinguish between the innocent and the guilty party? If, for example, a band of brigands is about to carry off a captive, and I promise to pay L. E. 100 to the leader if he will release him, the cause of the brigand's obligation to release the prisoner is unlawful for he is extorting money as the price of not committing a crime. But the cause of my obligation is perfectly lawful. And if I had paid the money to the brigand and afterwards brought an action for its restitution I could not at any rate be met by the defence that I was bringing an action founded upon my own turpitude. ?

Unlawful purpose common to both parties.

There can be no doubt that it is in the public interest to deny effect to contracts, the parties to which have agreed in a common purpose which is unlawful. If the parties conspire to introduce contraband goods, or to commit a crime, or to do anything which is prohibited by the law or is immoral, there is no difficulty about the application of the principle when the action is to compel the execution of the contract. The court will not listen to an action at the instance of either of them. When the nature of the contract is disclosed the judge will wash his hands of the affair and turn the rascals out of court. The doubt in this class of case is if there can be repetition of what has been already paid, a subject which will be discussed presently.

Contracts connected with or accessory to the unlawful purpose.

More delicate questions arise when the contract under investigation is not a contract to carry on jointly an unlawful enterprise

but is more remotely connected with some unlawful undertaking. 1 To what extent must there be participation in the illegality to make the contract void? If a gaming contract is unlawful in the sense that a man cannot sue for the recovery of the bet, does 2 the same rule apply to the man who lends money to the gambler? And what distinctions can we make based upon the knowledge 3 of the lender that his money was to be used for gambling, or upon the fact that he was to profit if the borrower was successful in the game?

Does public policy require that there shall be no right of repetition?

If public policy requires that certain contracts shall be treated as void, does this mean not only that no action shall lie to enforce them, but also that if anything has been paid under such a contract, the person who has paid will have an action of repetition to recover it?

Or, are there some contracts in which it is contrary to public policy to allow repetition, and other contracts in which it is equally against public policy to refuse repetition? And if this is the case and it is undesirable in the interests of morality to make a general rule of allowing repetition of what has been paid, is there anything in the texts of the codes to prevent us reaching 4 this conclusion? To many of these questions, as will be shown presently, the French law gives somewhat halting and undecided answers. And the reason for this is largely that the development of the law has been hampered by the presence of a very artificial theory of cause. It has been proclaimed *ad nauseam* by the writers and the courts that we are on no account to confuse the cause of an obligation with the motive which induces the party to enter into it. The courts, it is said, have nothing whatever to do with the motive. But it is now beginning to be seen that this is altogether a false conception of the matter. In judging whether a contract is against public policy or not one of the most relevant subjects of enquiry is what was the purpose of the parties in entering into it. And if we are not to look at the motive at all, it is difficult to see how such contracts as sale or lease can ever be unlawful, though it is plain enough that they can easily be against public policy. Until the French law has shaken itself loose from the traditional theory of cause, the subject of unlawful obligations will be extremely confused.

It is now necessary to consider what this traditional theory is.

When has an obligation no cause, or a false cause, or a simulate cause, or an unlawful cause?

Although the French Code, and the Egyptian Code which in this respect follows it, say that an obligation must have a lawful cause, it is really not of obligations in general but of contractual obligations only that they are thinking.

When the obligation is non-contractual it must necessarily have a lawful cause for the plain reason that the obligation is created by the law. It is only in the case of contracts that the question can arise whether there was a sufficient cause. Pothier does not fall into this mistake. He entitles his section on the subject *Du Défaut de Cause dans le Contrat. Obligations*, n. 42. And the Civil Code of Quebec heads its section dealing with cause, which is otherwise almost identical with C. C. F. 1131—1133, "*Of the cause or consideration of contracts.*" (C. C. Q. 989.) It is clear that a party who binds himself in a contract must do so from some motive or other unless his act is that of an imbecile or a lunatic. But the question is if the motive which impels him is a cause which the law regards as sufficient. (Aubry et Rau, 5th ed. 4, p. 548.)

Presumption that contract has a lawful cause.

The French Code says "*La convention n'est pas moins valable, quoique la cause n'en soit pas exprimée*" (C. C. F. 1132). And the Egyptian law is the same, though there is no similar article.

If no cause is stated it is the debtor who must prove that there was no cause, or that the cause was unlawful. (B.-L. et Barde, I. n. 318; Colin et Capitant, 2, p. 322; Cass. 22 janv. 1913, D. 1913. 1. 144; C. A. Alex. 10 mars 1897, B. L. J. IX, 190. *Contra*, Aubry et Rau, 5th ed. 4, p. 558, note 20.)

When we say that there was no cause for the contract we do not mean that there was no motive, but that the cause was not a juridical one. And the obligation of a party to a contract may have had a sufficient cause at the date of the agreement, but this cause may afterwards cease to exist, and when this happens his obligation becomes an obligation without a cause.

There is no doubt that the party is thereby liberated, seeing that in the bilateral contracts the obligations of the two parties are reciprocal. If the obligation of the one party falls to the ground in this way, that of the other party is likewise extinguished. If, for instance, I sell you my horse, and it turns out

that unknown to both of us my horse is dead at the date of the sale, my obligation to deliver the horse has become without a cause and I am relieved from it, while you are likewise relieved from your corresponding obligation to pay the price. We may reach the same result by saying if we like that the contract is null for want of an object. (D. N. C. C. 1126, n. 25.) But if I sell you my future crop for a lump sum the understanding may be that if there is no crop at all there will be no price. If the crop completely fails the obligation of the buyer falls to the ground for want of a cause. This is not quite like the last case because at the date of the contract there was an object seeing that we both contracted about a future thing. (P. F. *Oblig.* n. 7626 *seq.*) As we shall see later, future things may be the objects of contracts. There is an important exception in the French law to the rule that in a synallagmatic contract when one obligation fails for want of cause the corresponding obligation of the other party falls with it. In the sale of a certain determinate thing which is not to be immediately delivered, if it perishes before delivery without any fault of the vendor he is relieved from his obligation to deliver it, but the purchaser is not relieved from his obligation to pay the price. (Planiol, 2, n. 1341: B.-L. et Barde, 1, n. 445.)

But in Egypt we are not troubled with this difficulty because the law is different. The risk here would lie on the vendor although he had ceased to be the owner of the thing, and the purchaser's obligation to pay the price would become an obligation without a cause. (C. C. E. 297/371; De Hults, *Rép. vo. Vente*, n. 117: *infra*, 2, p. 480.)

French writers have to get over this difficulty of explaining how the purchaser's obligation to pay the price can have a cause when the seller's obligation to deliver the thing no longer exists by saying that it is sufficient as a rule that the cause should have existed at the date of the agreement. There are, however, many contracts in which this is not the case. In lease, for example, the cause is continuous.

The lessor's obligation is to allow the lessee to enjoy the thing let during a certain time. (C. C. E. 362/445.) And if he cannot do this the lessee is at once relieved from his obligation. If I let you my house and it is burnt down you cease to be liable to pay the rent from that time. (C. C. E. 370/453.)

Examples of contracts without a cause.

A contract to remunerate an agent for services for which he had been already paid is without a cause. (Cass. 22 nov. 1909, D. 1910. 1. 407.) A contract of insurance under which one of the parties runs no risk of loss is without a cause. (Cass. 19 nov. 1889, D. 90. 1. 293.) An accommodation bill—*effet de complaisance*, or *traite de complaisance*—is without a cause except in a question with a holder of it in good faith and for value. (B.-L. et Barde, l. n. 303; Thaller, *Traité Élémentaire de Droit Commercial*, 3rd ed. n. 1438; Lyon-Caen et Renault, *Manuel de Droit Comm.*, 11th ed. n. 574, *bis*; Paris, 9 août 1904, S. 1905. 2. 144.) It is a common device for a man who is in need of money or credit to draw a bill upon a friend or confederate who in fact does not owe him anything. The confederate accepts the bill as if he were a genuine debtor, and it can then be taken to a bank and discounted or otherwise used as an instrument of credit. Innocent third parties must be protected against such frauds, and therefore a person who has received such a bill in good faith and has paid for it can sue the acceptor and the drawer as if the bill were perfectly regular. (Cass. 30 mai 1899, D. 1900. 1. 508.) But the drawer cannot sue the acceptor, nor if the acceptor has had to pay can he sue the drawer for reimbursement, though he may have an action against him based upon the principle against unjust enrichment if he can prove that the negotiation of the bill enriched the drawer, and that this enrichment continues to exist at the date of the action. (Thaller, *ut supra*; Paris, 9 août 1904, *ut supra*.) The order of payment addressed by the drawer to the acceptor had the appearance of a bill of exchange but it was without a cause and could give no right of action to the parties to it. (See Lyon, 30 mars 1897, D. 97. 2. 305.) The obligation of the acceptor to the drawer was without a cause, and if the acceptor pays and brings an action of repetition the answer to him is that he is suing upon an unlawful cause, as he has lent his name to commit a fraud.

The form of contract called snowball—*boule de neige*—has been held to be a contract without a cause. It purports to be an aleatory contract but one of the parties runs no risk. It is an arrangement of this kind.

A merchant undertakes to deliver an object worth a hundred francs on the following terms:—The purchaser must pay twenty francs for a document to which five coupons are attached, four

of which he must sell at four francs apiece, retaining the fifth for himself. Each of the buyers of these coupons must pay twenty francs for a similar title. When this has been done the original purchaser can claim the article. Under this system the vendor does not run any risk at all. He is sure to get his hundred francs. (Trib. civ. Lille, 15 janv. 1900, D. 1900. 2. 239. See, however, Trib. Comm. de la Seine, 20 juill. 1901, S. 1904. 2. 49; Rev. Trim. 1904, p. 413.)

Partial want of cause.

It may be that an obligation is not entirely without a cause, but that the cause is not sufficient to support it to the full extent. In this case the contract ought not to be regarded as altogether void, but only as void *pro tanto*. (Larombière, art. 1131, n. 3; *Pand. Franç. vo. Oblig.* n. 7711; Caen, 10 juill. 1854, D. 55. 2. 162. Cf. Cass. 12 janv. 1863, D. 63. 1. 302.) For example, a natural obligation is in principle a valid cause for a civil obligation. But this does not mean that if a man has a natural obligation to pay £100 this will be a sufficient cause for a civil obligation to pay £1,000. It will be a sufficient cause only for a civil obligation of £100 or less. Upon this principle when remuneration is made for services which have been rendered without contract, or without any contract, compensation has been paid for loss caused, and the sum paid in either case is excessive, the court has power to reduce it. (1) An acknowledgment of debt for 100,000 francs may be good to the extent of 60,000 francs, because there was a natural debt of that amount for which the debtor could if he chose make himself civilly liable, but to the extent of the balance of 40,000 francs the acknowledgment of debt is no more than a gift. (2) The acknowledgment of debt, not being made in the form prescribed for gifts, will be good to the extent of 60,000 francs, but no more. (Req. 17 juill. 1906, D. 1910. 1. 286.) The same principle was applied in an Egyptian case. A man had promised to pay a large sum of money to a woman with whom he had cohabited. The court held that in the circumstances the man had caused the woman an injury which was a *lieit* consideration for the promise. He intended to make her a compensation for this prejudice, and the sum promised was to be regarded as an indemnity and not as a gift. But in the opinion of the court the amount promised was out of proportion to the prejudice caused, and accordingly the court reduced it. (C. A. 13 juin 1909, O. B. XI, n. 3. See *infra*, p. 299.)

False cause.

The French Code says an obligation without a cause or upon a false cause can receive no effect. (C. C. F. 1131.) The Egyptian Code does not use the term "false cause" at all, and the Civil Code of Quebec likewise avoids that expression. (C. C. E. 94 148; C. C. Q. 989.)

The term false cause is in fact apt to create confusion. It does not mean that if the cause stated in the contract is not the true one the contract is necessarily null. The cause stated is, in that case, in a certain sense, a false cause: it is a simulate cause which the parties choose to put forward in order to conceal the true cause. The effects of this simulation will be explained presently. But when the French Code speaks of false cause this is not the case which it has in view.

It uses the expression false cause to denote a cause which exists only in the mind of the party who binds himself. The classical example is this: As my father's heir I believe that I owe you a sum of money which he has left you in his will as a legacy. Instead of paying you the money it is agreed between us that I shall give you a certain immoveable instead. I then discover that the legacy in your favour has been revoked by a codicil. My contract to deliver the house to you now becomes void because its cause, which was the payment of the supposed debt, turns out to be false. You had, as it turns out, no legacy: I falsely supposed that you had, and it was this mistake that was the cause of my contract. (Pothier, *Oblig.* n. 42.) But, clearly, this is an illustration of want of cause. The so-called false cause which never existed except in my imagination is seen to be no cause at all the moment that I discover my mistake. The imaginary cause is now generally called by French writers the *cause erronée*. (Aubry et Rau, 5th ed. 4, p. 556. See Alex. 18 mai 1901, Sayour, *Rép.* n. 791.)

Want of cause or false cause generally implies essential error.

In most cases where an obligation has been entered into without a cause, or upon a so-called false cause, there will be error of such a kind as to entitle the party bound to have the contract annulled, but it does not follow that there is no practical importance in finding that a contract has no cause, for if this is the case the contract is inexistent or void *ab initio*, and not merely liable to be annulled. The importance of this distinction between con-

tracts which are voidable and those that are void, or to use the French terms *contrats nuls* and *contrats inexistants*, will be explained later. (*Infra*, p. 209.) But it may be said in passing, that one of the differences is that every person having an interest can challenge a contract on the ground of want of cause, seeing that such a contract is void *ab initio*, whereas when the contract is merely voidable it is only the party who entered into the contract in essential error or in consequence of fraud or violence who can challenge it. In the French law another important difference is that the action to find a contract inexistent is subject to the prescription of thirty years, whereas an action to annul the contract for error prescribes in ten years. (C. C. F. 1304.) But the Egyptian Codes do not make this difference, and in the Egyptian law both actions would prescribe in fifteen years. (See *Pand. Franç. Oblig.* n. 6768, B.-L. et Barde, 3, n. 1932.)

Simulate cause.

When the parties to a contract state a cause, but this cause is not the true one, it is called a simulate cause. For example, if having lost L. E. 100 to you in gambling I give you an acknowledgment that you have lent me that sum. (See C. A. Alex. 13 févr. 1902, B. L. J. XIV, 134.) When the parties state a cause for their contract which is not the true one this is generally because they wish to conceal the fact that their contract was for an unlawful cause. But this is not necessarily the case. It may simply be that they wish to keep their own secrets. If I am solvent and desire to benefit you, it is perfectly lawful for me to make you a gift of my house, but, for some reason or other, I may prefer that this should not be known, and I may choose to have a deed prepared from which it appears that you bought the house and paid for it. When, in spite of the simulation, there was a lawful cause the contract is valid. It is only when it had no cause or its cause was unlawful, or when it is prejudicial to the rights of creditors that the contract is void or voidable. The falseness of the cause stated in no way affects its validity. (B.-L. et Barde, 1, n. 308; Aubry et Rau, 5th ed. 4, p. 557, note 18; C. A. Alex. 13 mai 1903, B. L. J. XV, 279; C. A. Alex. 19 mars 1903, B. L. J. XV, 203; C. A. Alex. 1er févr. 1905, B. L. J. XVII, 95; Cass. 5 déc. 1900, D. 1901. 1. 192.) But the simulation, as will be explained presently, has an important consequence in regard to the matter of proof; there is a presumption against a contract when it is shown that the cause stated in it is not the true one.

Gifts concealed by simulation.

The important rule that simulation in itself is not a cause of nullity in contracts is clearly illustrated by the provisions of the Egyptian Codes with regard to the form of gifts. The codes provide that gifts, other than gifts of moveables delivered—*dons manuels*—must be made and accepted by an official instrument under pain of nullity. (C. C. E. 48/70.) But the gift is not null when it is made “*in the form of some other contract.*” (*Ib.*) The words in quotation marks do not occur in the corresponding articles of the French Code. (C. C. F. 931.) Their insertion in the Egyptian Codes clears up one of the most famous and long-standing controversies in the French law. The French jurisprudence has long been settled that gifts clothed in the form of another contract are valid if they satisfy the conditions required for that contract. (Cass. 3 nov. 1896, D. 97. 1. 584; Chambéry, 3 avril 1901, D. 1903. 2. 54; D. N. C. C. art. 931, n. 172.) The conditions are, (1) the parties must be capable; (2) the contract must be without fraud, the simulation not being so considered; and (3) it must not be in prejudice of the rights of third parties. Some of the French writers now accept the theory of the jurisprudence. (Aubry et Rau, 5th ed. 1, p. 175; Planiol, 3. n. 2553; Colin et Capitant, 3, p. 760.)

But many of the authors still protest, and argue that when the law lays down that a gift must be in a certain form on pain of nullity it is absurd to admit that if the parties choose to call the gift a sale they may relieve themselves from complying with the form prescribed for gifts.

The contract is in reality a gift, and it does not satisfy the form prescribed for gifts. The parties may have chosen to call it a sale, but it is not a sale for no price was paid. Accordingly, it is not good either as a gift or a sale. (Huc, 6, n. 191; Laurent, 12, n. 305; B.-L. et Colin, *Donations et Testaments*, I, n. 1239.)

Reasons for the jurisprudence.

The principal arguments which have prevailed with the French courts are:—

(1) If the parties could validly have made a gift directly there is nothing to prevent them from making it in an indirect way. One may do indirectly what one may do directly.

(2) It is admitted that a creditor may release his debtor from

his liability without a notarial deed. Yet what is that but making him a gift?

(3) To deny effect to these *donations déguisées* would cause great risk to innocent third parties.

If such gifts were to be annulled for want of form purchasers in good faith could never be secure. If, for example, a third party in good faith bought an immoveable from A who had apparently a good title by deed of sale from B, it would be monstrous if B could come forward afterwards and say, "the apparent sale by me to A was a gift and was null because it was not in the official form. A had nothing to sell to you and sold nothing." (See Cass. 29 mai 1889, D. 89. 1. 369; Cass. 3 nov. 1896, D. 97. 1. 584; B.-L. et Colin, *Donations*, 2nd ed. 1, n. 1237; Laurent, 12, n. 304.) In Belgium the courts follow the French jurisprudence. (Laurent, l.c.)

In Quebec the point is not settled. M. Mignault argues in favour of the nullity of the gift. (*Droit civil Canadien*, 4, p. 86. See *Barsalou v. Royal Institution*, R. J. Q. 5 Q. B. 383.)

But upon the strict interpretation of the French Code the authors have a strong case.

It is dangerous for the courts to strain the meaning of the texts in order to prevent injustice. As English lawyers say, "hard cases make bad law." And the Egyptian legislator has very wisely removed the difficulty by amending the texts themselves. This amendment makes it abundantly clear that in our law simulation in itself is not a cause of nullity of contracts. If I desire to make a gift to you, and I prefer to call it a loan or a sale, I state a simulate cause, but the gift is valid all the same if you show that its real cause was lawful.

Origin of the theory of cause.

The French law.

We have first to discover in what sense the word "cause" is used. The old writers distinguished three kinds of cause:—

(1) **Efficient cause.**—By this is meant that which produces or generates the effect, the source from which the effect flows. In this sense the cause of an obligation, according to the classification of the Egyptian Code, may be (a) agreement, (b) an act, or (c) the law; because every obligation has its source in one or other of these. But when we say that an obligation must have a lawful cause we cannot be using the word cause in this sense of efficient

cause, otherwise we should simply be saying, "for an obligation created by agreement there must be an agreement; for an obligation created by law there must be a law," and so on, which would be meaningless.

(2) Occasional cause or impulsive cause.—By this is meant the motive which induces a party to act. Motives are infinitely various.

If we take, by way of illustration, a sale, the motive of one buyer differs from that of another buyer, the motive of one seller from that of another seller. I buy a horse to use as a charger, or to drive in a cab, or to give away. A seller sells a horse because he wants to buy another, or because he is too old to ride, or because he wants to use for some other purpose the money which he can get for the horse.

(3) Final cause.—By this is meant the immediate end which the party had in view. In every bilateral contract the obligations of the parties are correlative. For instance, in sale the seller agrees to sell because the buyer agrees to buy. The buyer agrees to buy because the seller agrees to sell. The immediate end—*le but immédiat*—of the obligation of the one party is the obligation of the other, or, more precisely, it is the performance by the other of his obligation.

It is in this sense of final cause that "cause" is used in the article which says "every obligation must have a certain and lawful cause." In every bilateral contract the final cause is the same, that is to say, it is always the correlative obligation of the other party. The final cause of the buyer's obligation is always the obligation of the seller to deliver the thing, the final cause of the lessee's obligation is always the obligation of the lessor to grant the possession and enjoyment of the thing let, and so on. Likewise, in the unilateral contracts such as loan or deposit, the final cause of the obligation of the borrower or depositary—his immediate purpose—is to obtain the obligation by the other party to deliver the thing to him. But in the contract of donation where the donee has no duties, and it is only the donor who is bound to give what he has promised, there is more difficulty. What is the immediate end which the donor has in view? It is not to induce the donee to do anything, for he does not bind the donee to do anything. It can only be his desire to confer a benefit on the donee. In other words, we cannot distinguish here between the cause and the motive.

This is the theory of cause which the French Code means to lay

down and which our code means to adopt. (Demolombe, 24, n. 346; Colmet de Santerre, 5, n. 46; B.-L. et Barde, I. n. 297; Aubry et Rau, 5th ed. 4, p. 546; Colin et Capitant, 2, p. 313; D. N. C. C. art. 1131, n. 1.)

Its history.

This theory does not go further back than Domat. It was reproduced by Pothier and from him taken into the French Code. What Domat says is "In the bilateral contracts the engagement of one party is the foundation of that of the other. And in the agreements in which one party only appears to be bound, as in the loan of money, the obligation of the borrower has been preceded on the part of the other by that which he had to give to create the agreement. Accordingly, the obligation which arises in an agreement of this kind for the benefit of one of the contracting parties has always its cause on the side of the other party, and the obligation would be null if in truth it were without a cause. In donations the engagement of the donor is based upon some reasonable and just motive, such as a service rendered or some other merit of the donee or on the mere pleasure of conferring benefit. And this motive stands in place of a cause on the part of him who receives and gives nothing." (Liv. I., tit. I., sect. I. nos. 5 and 6. Cf. Pothier, *Oblig.* n. 42; Planiol, 2, n. 1029; B.-L. et Barde, I. n. 297.)

Where did Domat get his theory of cause?

The cause in Domat's theory is clearly not equivalent to that which is called by the commentators on the Roman law the *causa civilis*. The Roman law started with the principle that a mere agreement is not enforceable; it is a *nudum pactum*. There must be something over and above, some outward and visible sign to raise the *pactum* into a contract. This something in addition to the agreement was the *causa civilis*. It has been called the "binding fact." This varied in different classes of contracts; in fact the Roman classification of contracts is based on the different nature of the *causa civilis* in each. In the real contracts the *causa civilis* was the delivery of the *res*; in the innominate real contracts it was the performance by one party which raised the pact into a contract. In the verbal contracts it was the form of the *stipulatio*. In the literal contract it was the entry in the book. (Inst. 3. 21.) It is true that in the consensual contracts

which are relatively modern, there is no *causa civilis* over and above the consent of the parties. The history of the old French law presents an interesting parallel. For many centuries mere consent was not enough to make a binding contract, there must be some outward sign, the giving of a straw, of a *denier à dieu*, or the shaking hands—*la paumée*—or the drinking together as a sign that the bargain was concluded—*le vin du marché*. (Esmein, *Etudes sur les contrats dans le très ancien Droit Français*, Nouvelle Revue Historique, Vols. 4, 5, 6, 7; Glasson, *Histoire du Droit de la France*, 3, p. 223.) But from the 13th century the necessity for these symbols began to be disputed, and by the 16th century it was quite settled that they were not legally necessary. In the 16th century Loisel says:—

On lie les bœufs par les cornes et les hommes par les paroles et autant vaut une simple promesse ou convenance que les stipulations du Droit Romain. (Inst. Liv. 1., Tit. 1., Règle 2.) And Pothier expressly repudiates the Roman distinction between pacts and contracts. He says: "The principles of the Roman law upon the different kinds of pacts and upon the distinction between contracts and simple pacts, not being founded upon natural law, and being very far removed from its simplicity are not received in our law." (*Oblig.* n. 3.) It is therefore quite clear that the French law, which since the 16th century has accepted as a fundamental principle that mere consent is sufficient to bind the parties, has nothing to do with *causa civilis* in this technical sense in which the commentators on the Roman law used that expression.

Where then did Domat get his theory of cause? He got it from the Roman law but from texts of the Roman law in which the word cause is used in a different connection and not in this sense of the "binding fact."

In the Roman law in donations the motive of the donor was sometimes called the *causa donandi*. In the real contracts commentators sometimes called the source of the obligation, that is to say the *res*, by the name *causa*.

There were in the Roman law also a number of cases in which there was what was called a *condictio sine causa*, that being a right of action to recover something which had been paid without a cause, or something which the defendant was retaining without a valid cause. And in the innominate real contracts, as well as in some other cases, the party who had performed his prestation had an action against the other party who had failed to make the counter-prestation. He could claim repetition of the amount by

which he had enriched the other. And this action was called the *condictio causa data, causa non secuta*. (Dig. 12. 4. See Girard, *Manuel*, 5th ed. p. 622.) Similarly, when under an unlawful agreement one party had paid over money or money's worth to the other he had, if he was not *in pari delicto* with the other, an action for repetition of what he had paid, and this was called the *condictio ob turpem vel injustam causam*. (Dig. 12. 5.)

But the Roman lawyers never said that every obligation must have a cause. What they said was that a man who has been enriched without cause must give back what he had received. There are many difficulties about the Roman theory of cause with which we are not concerned here. (See Girard, *Manuel*, 5th ed. p. 455 and p. 620, and the excellent *thèse* of P. Sefériades, *Etude critique sur la théorie de la cause*, Paris, 1897, especially at p. 24.)

It is clear enough that "cause" in French law means the "final cause," and is not connected with the *causa civilis* of the Roman law, but with the "cause" in the sense in which the Roman lawyers used that term when they spoke of a *condictio sine causa* or of a *condictio ob turpem causam*. (Laombière, art. 1131, n. 2; Planiol, 2, n. 1031.) There is no doubt that the French Code, and our code in following it, intended to reproduce the theory of Domat and Pothier. The Spanish Code of 1889 reproduces this doctrine in express terms.

In article 1274 this code says: "In onerous contracts the cause as regards each of the contracting parties consists in the prestation or the promise of a thing or of a service made by the other party; in remuneratory contracts it consists in the service or the benefit for which recompense is to be made; and in the purely gratuitous contracts in the simple liberality of the benefactor."

But, although this theory is intended to be accepted by the legislator it is open to very serious criticism, and the opinion may be hazarded that in the next revision of the French Code the element of cause as essential to an obligation will disappear altogether, as it has disappeared from the German and Swiss Codes. There is only one case, probably, in which any part of the theory of cause will be retained, and that is to explain the quasi-contracts. As we shall see later, there are many cases in which a man has received a benefit for which the law says he must pay, although he has made no contract to do so. If he has paid money by mistake he must restore it, and so on.

In such cases he is said to be enriched without a legal cause. (*Infra*, 2, p. 163.) But apart from these cases of quasi-contracts, the unsatisfactory character of the theory of cause is very clear.

Let us apply it to the different classes of contracts. In the synallagmatic or bilateral contracts it is said that the cause of the obligation of the one party is the obligation of the other. The cause of the buyer's obligation to pay the price is the seller's obligation to deliver the thing, and the cause of the seller's obligation to deliver the thing is the buyer's obligation to pay the price. But this is reasoning in a circle. They cannot both be effects and both causes, for the cause must precede the effect, and in this case the two obligations come into existence simultaneously. It is much more correct to say that the seller becomes bound only on the condition of the payment of the price and that, if this condition is not fulfilled, there is no longer any contract. Or, take the real contracts. It is said that the cause of the obligation of the borrower, for example, is the delivery to him of the thing. But this is the cause of his obligation in a different sense altogether. It is the source or efficient cause of his obligation, and not the immediate end which he has in view—the final cause. Lastly, in the case of a gift, even according to the classical theory itself, there is no cause discoverable except the desire to confer a benefit. But this is the motive, and yet we are told we must carefully distinguish the cause from the motive.

But in addition to all these difficulties, it is when we inquire what is meant by an unlawful cause that we find the classical theory breaks down completely. If the cause of the obligation of the one party is the obligation of the other party, and we have no right to inquire into the motives of the parties, how can the cause be unlawful? It is always lawful in the abstract for a seller to deliver a thing and for a buyer to pay the price, for a lender to lend money and for a borrower to return it. But in the French jurisprudence it is perfectly settled that there are many cases in which such obligations are unlawful. If a lessor lets a house knowing it is to be used for prostitution he cannot sue for the rent. (Guillouard, *Louage*, 1, n. 72; Alger 15 nov. 1893, D. 94. 2. 528; D. N. C. C. art. 1133, nos. 478 *seq.*)

According to a French decision, if a waiter in a club lends money to a gambler to enable him to go on with his game the contract has an unlawful cause. (Cass. 4th juillet 1892, D. 92. 1. 500. But there is nothing unlawful in lending money in itself, and if we are not entitled to consider the motive, and the cause in every loan is the same, namely, the delivery of the money, there can on this theory never be an unlawful loan. The truth is, as we shall see more clearly in explaining the object of contracts, that when the intention of both parties to the contract is the doing

of something which is prohibited by the law, the contract is unlawful.

In fact the French jurisprudence is becoming more and more settled that not only must the act itself which is the object of the obligation be lawful, but the immediate end which the parties have in view in performing the act must likewise be lawful. Contrary to all the writers who say that the courts have no concern with the motives which induce the parties to enter into the contract, the courts hold to their view that contracts of which the purpose is unlawful cannot be sustained.

The thing aimed at—*le but*—must be lawful. And by *le but* we do not mean *le but immédiat*.

The immediate end of the borrower is merely to get the money. But *le but* in the sense of the jurisprudence, means his determining motive, viz. the reason why he wants to get the money. It is on this ground that the French courts hold such contracts as the following unlawful. 1. A loan to enable the borrower to buy a house of prostitution or to furnish it and carry it on. (Req. 1 avr. 1895, S. 1896. 1. 289.) 2. A lease or an assignment of the lease of such a house. (Amiens, 1er avr. 1912, Gaz. Pal. 1912. 2. 136; Rev. Trim. 1912, p. 980.) 3. The sale of such a house if the buyer is to carry it on in the same way. (Caen, 29 juillet 1874, D. 75. 2. 217. See other cases in D. N. C. C. 1133, nos. 478 seq.) 4. A loan made to a gambler to enable him to continue his game. (Cass. 4 juill. 1892, S. 1892. 1. 513; Cass. 31 juill. 1907, S. 1911. 1. 522.) 5. A partnership to carry on the business of smuggling goods from abroad. (Douai, 11 nov. 1907, D. 1908. 2. 15.) 6. A contract made with an agent to pay him a large commission if he succeeds in getting contracts from foreign governments, when it is proved that part of this commission was intended to be used to bribe officials of these governments. (Req. 15 mars 1911, D. 1911. 1. 382.)

In exactly the same way in Egypt the Mixed Court of Appeal has held that a sale of arms by a foreign firm was unlawful when the seller knew that the arms were to be clandestinely introduced into Egypt where their importation was illegal. (C. A. Alex. 27 janv. 1909, B. L. J. XXI, 136.) Such contracts as the above can only be considered unlawful on account of the motives of the parties.

If they are unlawful it is because the aim which the parties contemplate is immoral or against public policy. Loan, or sale, or partnership are in themselves perfectly lawful contracts, and if the cause of the seller's obligation is the obligation of the buyer to

pay the price a sale can never have an unlawful cause for the payment of the price in itself can never be anything but lawful. If it is to be unlawful at all it can only be so on account of the motives which induced the parties to contract. It is clear that when the loan or the sale is in good faith the lender or the seller cannot be affected by the use subsequently made of the money or the property any more than a banker who cashes a customer's cheque has anything to do with the application of the money. (See, e.g., *Brosseau v. Bergeron*, 1905, R. J. Q. 27 S. C. 510, a Quebec case.)

But, on the other hand, the French jurisprudence is settled that when the intention of both parties to the contract is the doing of something which is prohibited by the law the contract is unlawful. The determining motive—*le but*—must be lawful. As M. Léon Duguit puts it:

Mais voici qu'apparaît toute une jurisprudence dans laquelle au grand étonnement de nos civilistes classiques, on voit intervenir au premier plan un autre élément, l'élément but, et la valeur sociale de cet élément. Pour qu'un acte de volonté puisse produire un effet de droit il faut bien toujours qu'il ait un objet licite.

Mais cela ne suffit plus; il faut encore qu'il soit déterminé par un certain but, que ce but soit un but de solidarité sociale, un but ayant une valeur sociale, conformément au droit objectif du pays considéré. Et cela est encore une conséquence évidente de la socialisation du droit. Voilà un nouvel élément qui pénètre dans le droit traditionnel et y apporte une transformation profonde. (Transformations générales du Droit privé, p. 95.)

It may be pointed out that the English law is exactly the same. When the intention of both parties to a contract is the doing of something which is prohibited by the law the contract is void. It is not necessary that the unlawful use of the subject matter should be part of the bargain if the intention of the one party so to use it is known to the other at the time of the agreement.

So, where property is sold or leased by a person who knows that the buyer or lessee intends to use it for an illegal or immoral purpose the contract is void. (*Pearce v. Brooks*, 1866, L. R. 1 Ex. 213, 35 L. J. Ex. 134; *Taylor v. Chester*, 1869, L. R. 4 Q. B. 309, 38 L. J. Q. B. 225. See Pollock, *Contracts*, 8th ed. p. 386.) The case is still clearer where the seller or lessor is to be paid by the profits made by the illegal use of the property. In a Quebec case, for example, an immoveable was sold with an agreement that it should be used for carrying on a lottery for the common benefit of the vendor and the purchaser. The sale

was held to be radically null. *Bédard v. Phoenix Land Improvement Co.*, 1912, R. J. Q. 42 S. C. 1.)

But this element of common intention to carry on an unlawful enterprise together, or to share in the profits gained thereby, is not essential in the English law. It is enough to make the contract void if the unlawful intention of the one party was known to the other. (*Pearce v. Brooks*, *ut supra*.) In America this point is disputed. (See the cases in Pollock, *Contracts*, 3rd American ed. p. 485.) This question will need to be referred to later in speaking of unlawful contracts.

English law does not require "cause" but requires "consideration."

Upon the whole subject of unlawful and immoral contracts we shall see later that there are great similarities between the English and the French law. But although the English law refuses effect to contracts which are against public policy, it does not say that every contract must have a cause. The term "cause" is not a term of the English law.

In place of the requirement of "cause" the English law has the requirement of "consideration." A contract not made under seal; that is to say, not in the form of what is called technically a "deed," is not valid unless the promisor gets or is to get valuable "consideration" from the promisee.

It is probable that the English doctrine of "consideration" has no connection with the civil law theory of "cause." It was the growth of the common law (*a*). It is a term much narrower than "cause." (See *Jayawickreme v. Amarasuriya*, 1918, A. C. 869, 87 L. J. P. C. 165.) The rules as to "consideration" are difficult to summarise and are not of particular interest to continental lawyers. It may suffice here to give the most authoritative definition of "consideration."

"A valuable consideration in the sense of the law may consist either in some right, interest, profit or benefit accruing to one party, or some forbearance, detriment, loss or responsibility given, suffered, or undertaken by the other." (*Currie v. Misa*, 1875, L. R. 10 Ex. 162, 44 L. J. Ex. 94. On "consideration" see Pollock, *Contracts*, 8th ed., pp. 175 *seq.*; Anson, *Contracts*, 14th ed., pp. 96 *seq.* Its history is curious and interesting, but too special to be noticed here.)

(a) See Ames, J. B., in *Select Essays in Anglo-American Law*, Cambridge, 1909; Street, T. A., *Foundations of Legal Liability*, 2, pp. 1—161.

CHAPTER III.

THE OBJECT OF OBLIGATIONS.

By the object of an obligation is meant that which the debtor promises to pay. It is the thing which is due. It is, as some old writers express it, the answer to the question *quid debetur*, whereas the cause of the obligation is the answer to the question *cur debetur*. If the obligation is a positive one the object of it is a prestation, that is an act which the debtor promises to perform. If the obligation is a negative one its object is an abstention, that is an act which the debtor binds himself not to perform.

Object of obligation not to be confused with object of contract.

The French Code sometimes speaks of the object of an obligation and sometimes of the object of a contract. In that code, for instance, section 3 of title 3 of book 3 is headed *de l'objet et de la matière des contrats*, whereas article 1129 of that section says *il faut que l'obligation ait pour objet*, etc. (Cf. C. C. F. 1126, 1128, with C. C. F. 1129, 1130.)

The French legislator treated the object of obligations and the object of contracts as being identical. (See on this confusion, Boudant, *Contrats*, nos. 172, 195; *Pand. Franç. Oblig.* n. 7609; B.-L. et Barde, 1, n. 243.) But this is not correct. The object of a contract is to produce obligations. A contract has not, necessarily, any single object. The contract is a juridical act which produces obligations. If the contract is a bilateral one it produces two or more obligations. Thus, the contract of sale engenders a number of obligations on the part of the seller and on the part of the buyer respectively. We cannot point to any single prestation and say that this is the object of the contract. In an unilateral contract it is more natural to confuse the object of the contract with the object of the obligation. If A and B enter into a contract of donation under which A promises to give his house to B, the contract creates a single obligation only, namely, to give the house. Here we might say, not unnaturally,

that the object of the contract was the same as the object of the obligation which it created, viz. the giving of the house. But, strictly speaking, here also the object of the contract of donation or its effect is to create the obligation to give, whereas the object of the obligation to give is the act of giving. It is not surprising that the French codifiers should have confused the two things, because Pothier, their constant guide in this part of the law, confuses them also. (Cf. Pothier, *Oblig.* n. 53, with *Oblig.* nos. 129 *seq.*) But he entitles that part of his treatise in which he enumerates the qualities of the object *De ce qui peut faire l'objet et la matière des obligations*. (Part 1, chap. 1, section 4.) The Egyptian Code and the Code of Quebec avoid this confusion. They do not use the expression "object of contracts" at all, but speak only of the object of obligations (C. C. E. 95/149; C. C. Q. 1058); and the Code of Quebec under the heading "Of the effect of Contracts" says "contracts produce obligations." (C. C. Q. 1022.)

The object of an obligation must be an act.

Upon this point also the Egyptian Code is more correct than the French Code. The French Code, in accordance with the traditional language on the subject, says that the object may be either a thing or an act. Where the obligation is an obligation to transfer—*obligation de donner*—the object is the thing to be transferred. (C. C. F. 1126.) If I sell you my house the object of my obligation is the house. And even when the obligation is merely to deliver an article without transferring the property, the object is the use or possession which is given under the obligation—*le simple usage ou la simple possession d'une chose peut être, comme la chose même, l'objet du contrat*. (C. C. F. 1127; Pothier, *Oblig.* n. 150.)

According to the French Code the object of every obligation to deliver is *une chose*; the object of an obligation to do is an act—*un fait*—and the object of an obligation not to do is an abstention.

Strictly speaking, however, what the debtor binds himself to do must always be an act, including under that term an abstention.

If I sell you my house my obligation is to transfer the property to you, and this includes the obligation to deliver it. That which every debtor promises is necessarily either an action or an in-

action. Accordingly, the Egyptian Code does not say the object of an obligation may be either a thing or an act. It says, quite correctly, that it must be an act. (See Planiol, 2, n. 999.)

Qualities which the object must possess.

Under the Egyptian Native Code *the object of an obligation must, under pain of nullity, be the doing of something lawful and possible, and, in the case of an obligation to transfer a thing such thing must be an object of commerce; it must be determinate at least as to its kind, and its quality must admit of being determined according to the circumstances.* (N. C. C. 95.) The article in the Mixed Code differs only in expression. It says *in the case of an obligation to give, the subject matter of the obligation must be something which can be dealt with in the way of trade.* (M. C. C. 149.)

This single article in the Egyptian Code takes the place of four articles in the French Code. *Tout contrat a pour objet une chose qu'une partie s'oblige à donner, ou qu'une partie s'oblige à faire ou à ne pas faire.*

Le simple usage ou la simple possession d'une chose peut être comme la chose même, l'objet du contrat.

Il n'y a que les choses qui sont dans le commerce qui puissent être l'objet des conventions.

Il faut que l'obligation ait pour objet une chose au moins déterminée quant à son espèce.

La quotité de la chose peut être incertaine, pourvu qu'elle puisse être déterminée. (C. C. F. 1126-1129.)

The language of the French Code is somewhat different from that of the Egyptian Code because, as has been just explained, in the case of the *obligation de donner* the French law considers that the thing to be delivered is the object of the obligation. The Egyptian law, more logically, holds that in this case also the object of the obligation is not the thing delivered but the action of delivery.

But in the nature of things the qualities which the object must possess are not the same in the case of the obligation to transfer as they are in the case of the obligation to do, and we must accordingly consider these separately.

1. Obligation to transfer.

The object here is the delivery of a thing, but there cannot be a valid obligation to deliver a thing unless it possesses the following qualities:—

(a) It must be in existence, unless the parties *intended* to deal about a future thing.

(b) It must be an object of commerce, and in the case of the obligation of a seller it must not be a determinate thing belonging to another.

(c) It must be determinate at least as to its kind, and its quality must admit of being determined according to the circumstances; and

(d) It must be possible to transfer it from the one party to the other.

2. Obligation to do.

Here the thing which the debtor promises to do must be:—

(a) Possible;

(b) Lawful;

(c) Personal to the debtor; and

(d) Something which the creditor has an interest in enforcing.

These requisites of the object require some explanation.

Qualities of object in obligation to transfer.

(a) Existence of the thing to be transferred.

Although in the Egyptian law the delivery and not the thing to be delivered is the object, yet seeing that there can be no delivery without a thing to be delivered, the existence of the thing is essential in the Egyptian law as in the French law. When there is an obligation to deliver a specific thing the thing must be in existence at the date of the contract or the obligation is void for want of an object. But this will not be so when the parties intended to transfer a future thing, a case which will be explained later. If on the other hand, they dealt with one another on the footing that the thing existed and it turns out that it did not exist, there is no contract but only the appearance of a contract. If I sell you my horse, which unknown to both of us was dead at the time of the sale, there is no sale. (Baudry-Lacantinerie et Barde, 1, n. 245.)

2 If I knew of the death of my horse when I sold it and you suffer loss in consequence of the sale, as, for instance,

by losing the chance of buying another horse, I shall be liable to pay damages, and I shall be liable also, if, although I did not know of the death of my horse, I ought to have known of it had I used ordinary care. (B.-L. et Barde, 1, n. 244.) It has been held in France that when the thing sold had at the date of the contract entirely lost its merchantable character it must be considered as being no longer in existence. A sale was made of beetroots—*les objets étant rendus dans l'état où ils se trouvaient sans aucun recours contre le vendeur à raison de leur plus ou moins bon état*.

Before the sale the beetroots had become rotten in consequence of frost. The Court of Paris held that as they had totally lost their merchantable character as foodstuff before the sale there was no object, and the Court of Cassation accepted this view. (Cass. 5 févr. 1906, S. 1906. 1. 280, D. 1907. 1. 468.) The sale here was expressly made without any warranty by the vendor or otherwise it would not have been necessary to fall back on this principle.

Future things.

Although the rule is that the thing to be delivered must be in existence if the obligation is to be valid, this is so only when the parties dealt about it on the footing that it existed. There is no general rule of the French law which prohibits men from dealing about a thing which is not yet in existence, but which it is expected or hoped will come into existence at a future time. The French Code has an express article upon this point, allowing contracts about future things with one exception.

Les choses futures peuvent être l'objet d'une obligation. On ne peut cependant renoncer à une succession non ouverte ni faire aucune stipulation sur une pareille succession, même avec le consentement de celui de la succession duquel il s'agit. (C. C. F. 1130.)

The Quebec law is the same. (C. C. Q. 1061.)

The Egyptian Codes have no corresponding article.

It might be argued that the Egyptian legislator intended to make all sales of future things invalid. But this would not be a sound interpretation. The codes give an enumeration of things which cannot be sold and this does not include future things, and they say that the sale of future successions is null, which would be an unnecessary declaration if the sale of any future thing was null. (C. C. E. 259-264/326-333.) The sale of

future things is an everyday matter. People buy machines or ships which are not yet constructed and the validity of such sales is not disputed.

So a man may sell his right to alluvion, as for example, to land formed by a change in the Nile, although such alluvion has not yet been formed. (Court of Kena, 13 Feb. 1901, *Al Hokouk*, 16, n. 23, p. 58. See *Loi Territoriale*, 5 août 1858, art. 14; *Législation en Matière Immobilière*, ed. 1901, p. 35; Fathy Zaghloul, *Comm.* ed. 1913, p. 72. Cf. *D. N. C. C.* art. 1130, n. 5.)

In the Mohammedan law, however, the sale of things not in existence at the time of the contract is null. (*Statut Réel*, 383; *Trib. civ. Alex.* 13 déc. 1913, *Gaz. Trib.* 4, n. 128.)

Future crops.

This is, probably, the reason that there is an article in the Mixed Code which forbids the sale of future crops: *A sale of the fruits of a tree when they are not yet formed or of a crop which has not yet appeared above the ground is void* (art. 330). The Native Code contains no similar provision, which is the more singular because the parties to suits before the Native Tribunals are most generally Mohammedans, and it might have been expected that the Mohammedan law would have been preserved for them rather than for the parties to suits before the Mixed Tribunals, who are likely to be non-Mohammedans. In interpreting this article which almost seems to have been inserted without consideration of its inconvenience, the Mixed Tribunals have shown a decided wish to narrow its scope as far as possible.

In the Roman law an obligation with regard to a future thing was differently considered according as it took one or other of two possible forms. (1) It might be a condition express or implied that the future thing should come into existence, or that if it did not there was to be no obligation. A man might buy, for instance, for a fixed price a future crop or the foal to be born of a certain mare. In such a case, the presumption was that if there was no crop, or practically none, or if the foal were born dead, no price was to be paid. This kind of sale the Roman lawyers called *emptio rei speratae*. (Dig. 18. 4. 11; Dig. 18. 1. 8; Girard, *Manuel*, 5th ed. p. 540, note 1; Pothier, *Vente*, n. 5; *Pand. Franç. Oblig.* n. 7627.) But it might appear from the terms of the

contract or from the circumstances that no condition of this kind was intended.

(2) In the second case there was no such implied condition that the thing should come into existence. The object of the sale is the *alea* or chance.

The price was to be paid whether the future thing ever came into existence or not. If a man buys a lottery ticket, or whatever may be caught by the cast of a fishing net—*un coup de filet*—he is well aware that it is a pure speculation. He pays the price for the mere chance and the price is a correspondingly small one. The price of a lottery ticket is trifling compared with the first prize precisely because the chance of drawing the first prize is not great. This kind of sale the Romans called *emptio spei*. It is a question of interpretation in each particular case whether the parties intended the sale to be of the former kind or of the latter. But the amount of the price is generally a sufficient indication. The buyer is not likely to have promised a large price for a mere chance. In interpreting article 330 the Mixed Courts have drawn practically the same distinction as the Roman law made. They have held that the sale of a future crop prohibited in that article is only a sale of an aleatory character. That is, it must be a sale in which it is impossible to say at the date of the contract if the price is a reasonable one or not. If a man agrees to pay a certain price for a future crop whether there is any crop or not, or whether the crop is a good one or a bad one, it would fall under the prohibition because the price named might be grossly excessive. On the other hand, when the sale is the sale of a crop at the market price per kantar at the time of delivery this is not a prohibited sale. (C. A. Alex. 15 févr. 1900, B. L. J. XII, 117; C. A. Alex. 8 mai 1912, B. L. J. XXIV, 323; C. A. Alex. 13 juin 1912, B. L. J. XXIV, 407.) And the same court has also held that the nullity of the sale of a future crop is a relative nullity, created only in favour of the seller, so that if he prefers to let the sale stand nobody else can challenge it. (C. A. Alex. 4 févr. 1904, B. L. J. XVI, 131.)

In a more recent case the Court contents itself with saying: *On ne peut invoquer l'article 330 C. C. pour faire déclarer nuls les contrats par lesquels, conformément aux usages nés des nécessités du commerce du coton, les propriétaires de terrains vendent aux négociants le coton de leurs terres avant qu'il soit sorti de terre, et parfois même avant même qu'il soit ensemencé.* (C. A. Alex. 18 févr. 1914, B. L. J. XXVI, 230.)

In France the sale of a future crop is perfectly lawful and valid. (B.-L. et Barde, 1, n. 247; B.-L. et Saignat, *Vente*, n. 97; Aix, 11 juin 1908, D. 1910. 2. 305, *dissertation* by M. Valéry.)

Future successions.

By the Egyptian Codes *the sale of rights under a succession to the estate of a living person is void, even if he consents to the sale.* (N. C. C. 263.) In the Mixed Code the article is: *The sale of the rights to succeed on his death to the estate of a living person is void, even with his consent.* (C. C. M. 332.) The corresponding article of the French Code has been given above (p. 68). The prohibition of the sale of a future succession is traditional in the French law and it existed in the Roman law. (Code, 2. 3. 30.)

The reason upon which it was based was that such an agreement was contrary to public policy, because the person who would profit by the death might be tempted to accelerate it.

But in the Roman law the stipulation was permitted if the person whose succession was in question gave his consent to it. In the French law and in the Egyptian, even his consent cannot give any validity to the contract. It is an absolute nullity of which any person interested can take advantage and it cannot be validated by ratification or otherwise. (B.-L. et Barde, 1, n. 261; Planiol, 2, n. 1015.) The reason which the Roman law gave for the prohibition is not the only one which weighed with the French legislator. If the only reason were the possible encouragement of assassination it would be illogical to allow, as the modern law does, contracts which are quite as dangerous. For example, a man is allowed to sell property and to receive the price in the form of a life-rent, though in such a case the buyer has a clear interest in accelerating the death of the seller. But there are two other reasons which made the French codifiers regard the sale of rights of succession to a person living as contrary to public policy. In the first place, it would encourage usurers to take advantage of the necessities of expectant heirs who might be tempted to sell their chances of succession for much less than their true value. And in the second place, such agreements tend to prevent that equal division of property which the law considers desirable. By a right of succession in this article is meant either the whole or a fraction of the future succession, or even some specific thing comprised in the estate to which the heir expects

to succeed. And it is immaterial whether the seller would if he succeeded be an heir or merely a legatee, or whether the buyer be another heir or a stranger. But, in order to fall under the prohibition, the agreement must be to sell something to which the heir expects to succeed. If a father promises to pay a dowry after his death there is nothing unlawful in this.

Nor is the promise to pay something after the death of a third person invalid if the promisor is bound independently of the question whether he takes anything under the succession of such third person or not. (See Grenoble, 20 juin 1900, D. 1902. 2. 277; Cass. 27 janvier 1904, D. 1904. 1. 359.)

(b) Object of commerce.

The second requisite of the object of an obligation to transfer is that it shall be an object of commerce. The word "commerce" here is not used in its popular sense, in which we say that merchants are engaged in commerce, but in the wider sense corresponding to the Latin *res in commercio*, as meaning all articles which can be owned by individuals and which they are not prohibited from transferring to others. The general rule is that all things are in commerce unless it is otherwise provided; the list of things not in commerce is a list of exceptions. (See Planiol, 2, n. 1011; B.-L. et Barde, 1, n. 248; Halton, 2, 14.)

These things excepted from commerce include:—

(1.) Property held by the state or by any public authority for public uses. For so long as things are appropriated to the general use of the community it is clear that no private individual can acquire rights over them;

(2.) Things which it is forbidden by the criminal law to sell, as for instance, hasheesh;

(3.) Political rights and official positions;

(4.) Rights of status;

(5.) Freedom of work and trading.

The first of these heads cannot be explained here. The others will be referred to later in dealing with unlawful contracts. But it is convenient to notice here the rule of the law of sale that the object of the seller's obligation cannot be a determinate thing belonging to another.

Sale of a determinate thing belonging to another.

In the Egyptian law the sale of a determinate thing which does not belong to the vendor is declared to be void. (C. C. E. 264/333.) But the article in the codes is rather misleading. There is no sale in this case in the strict sense of the term, but there may be, as will be explained presently, a valid contract. Moreover, if the real owner of the thing sold likes to do so he can validate the sale. His ratification makes the contract a good sale. (*Ib.*) In other words the nullity is not absolute as in the previous case, it is relative. The purchaser cannot say the sale is void, if the real owner desires it to stand. The French Code does not explain whether the nullity in this case is absolute or relative, and in the French law there has been considerable controversy upon the point. But the better opinion appears to be that which the Egyptian Code has adopted, namely, that the nullity is relative. (Planiol, 2, n. 1422; D. N. C. C. art. 1599, nos. 88 *seq.*) The application of the rule which makes void the sale of a specific thing belonging to another is less wide than it appears to be. In the Roman law and in the old French law the seller of an article did not undertake by the contract of sale to make the purchaser there and then the owner of it.

The seller only undertook to procure the delivery of the thing and to secure the buyer in the peaceful possession of it. Accordingly, there was no reason why a seller might not undertake to procure the delivery of a thing which did not belong to him but belonged to another. (Dig. 18. 1. 28; Girard, *Manuel*, 5th ed. p. 540; Pothier, *Vente*, n. 7.) It is true he might not be able to fulfil his contract if the real owner was not willing to sell, and, in this case, the seller might be liable in damages for having undertaken to do something which he was unable to carry out. But he was merely in the same position as any other party who was in breach of an obligation to do. But in the modern law, by which the contract of sale is a conveyance as well as a contract, and the buyer becomes the owner of the thing at the moment of the sale, the essence of the sale is defeated, or in other words there is no sale at all, if this transfer of property cannot take place. If the seller is not the owner he cannot make the buyer the owner.

(2) But this nullity only takes place when the purchaser believes that by the sale he is to become at once the owner of the thing.

(3) If he knows that the seller is not the owner and that he is

merely undertaking to procure the thing for the buyer, or to pay damages if he cannot do so, this is a perfectly valid contract. It is not a contract of sale in the strict sense but the law does not in any way prohibit it. In the second place, it must be noted that it is only the sale of a determinate thing belonging to another which is declared to be null; the prohibition does not affect the sale of generic or fungible things. (Guillouard, *Vente*, 3rd ed. 1. n. 188; Thaller, *Traité Élémentaire de Droit Commercial*, n. 1008.) The seller may sell, for example, a quantity of coal or cotton though he has no coal or cotton in stock.

In such sales the intention of the parties always is that the seller undertakes to produce and deliver the quantity and quality sold.

And according to the custom of business, stocks and shares are regarded as fungibles. The stockbroker constantly sells shares which he does not own in the expectation that he can procure them before the settling day. (Grandmoulin, *Contrats*, n. 42.)

The full explanation of what is meant by an object of commerce belongs to the law of sale.

(c) Determinate as to kind and quality.

In addition to being an object of commerce the object of an obligation must be determinate at least as to its kind. (C. C. E. 260-327.)

If the object is a specific thing—a *corps certain*—it is determinate not only as to its kind but as to its individuality; as if I sell you my black horse "Solon." In the sale of such a specific thing the property passes as soon as the contract is completed even before delivery. Nothing is required to determine the object; it is determined *ab initio*. (C. C. E. 266/336; C. C. F. 1583; C. C. Q. 1472.) But the object may be an article of which merely the kind is determined but something has to be done to determine the individual belonging to the kind. And in the French law and the law of Quebec this may be so not only when the sale is a sale of fungibles, but also when it is a sale of an individual article belonging to a particular kind. For instance, I may sell you a horse or a cow without further determination. In such a case the property does not pass until I have decided what particular horse or what particular cow I am going to deliver and have notified you to that effect. There is a valid contract of sale by the agreement of parties but the property cannot pass until there has been a specific determination of the

object in this way. If I sell a horse or a cow without further determination, I may not choose to deliver a horse or a cow of great value, but it will be at any rate a horse or a cow. Moreover, my freedom of choice is not so unrestricted in the French law as might at first appear. It is restricted in the first place by the article which declares that if the debt be of a thing determinate only as to its kind the debtor in order to liberate himself will not be bound to give a thing of the best quality, but he cannot give a thing of the worst. According to this rule, I must give a thing of merchantable quality—*une chose loyale et marchande*. (C. C. F. 1246; C. C. Q. 1151; Pothier, *Oblig.* n. 131; D. *Rép. Oblig.* n. 1761.) Moreover in many cases, the thing may be more determinate than it might seem to be upon the bare terms of the agreement. This is so when the seller sells an article which he knows is destined for a particular purpose. If, for instance, an army contractor buys cavalry horses or an omnibus company buys horses for its business and the seller is informed of the purpose for which the horses are required or is already aware of it he will be held to have bound himself to deliver horses suitable for this purpose. (B.-L. et Barde, *Oblig.* 1, n. 283.) But in any event the kind of thing must be specified. The sale of an animal without further determination would be null, for the seller might deliver something of no value at all, such as a flea or a microbe. (B.-L. et Barde, 1, n. 282.) Obligations as to things determinate only as to their kind, such as the sale of a horse without specification of the particular horse, do not occur very frequently, and the Egyptian Code perhaps does well to refuse effect to contracts of this kind. It declares that it is only in the case of fungibles that there can be a valid sale when the thing is determined only by its kind. We may sell so many kantars of cotton, or so many yards of silk, without identifying at the time the particular kantars or the particular yards, but we cannot sell a horse without identifying it. (C. C. E. 261/328.) Further, in the case of the sale of fungibles identified only by kind the contract must supply the means for determining the quality. (C. C. E. 95/149.)

Determination of object in sales of fungibles.

It is in regard to the sale of fungibles that the question as to determination generally arises. The greater part of commercial transactions are concerned with sales of fungibles, so much cotton, or coal, or wine, and so on.

Here too the object must not be derisory. Just as the sale of an "animal" without further specification is ineffectual because the seller might deliver an animal of no value, so a sale of "wheat" or of "wine" is null, for the seller might deliver a grain of wheat or a drop of wine.

The rule that the object must be determined at least in kind is further limited by the rule that the creditor must have an interest in enforcing the contract. But, subject to these considerations, the sale may be a sale of a certain quantity of fungibles which have to be separated and specifically appropriated to the buyer by being counted or measured or weighed. (C. C. E. 261-328; C. C. F. 1585; C. C. Q. 1474.)

It is of course perfectly possible to sell fungibles which are already specifically determined, as when a man sells for a certain price the whole stock of a business, or all the wheat in his barn. This is called a sale in the lump or *en bloc*, and it is in fact a sale of a specific thing. There is nothing to prevent the buyer becoming the owner there and then if the thing is in existence, just as if he had bought an individual thing such as a horse. (C. C. E. 240, 306; C. C. F. 1585; C. C. Q. 1474; B.-L. et Saignat, *Vente*, n. 146; Aix, 11 juin 1908, D. 1910. 2. 305, *dissertation* by M. Valéry. Cf. C. A. Alex. 9 févr. 1905, B. L. J. XVII, 119; C. A. Alex. 31 mai 1877; R. O. II. 382; Halton, 2. p. 71.) And, according to the Egyptian jurisprudence, the sale of all the future crop to be produced on a definite area of land is the sale of a specific thing. (C. A. Alex. 18 févr. 1914, B. L. J. XXVI, 230. *Supra*, p. 70.)

But it is when the sale is a sale of a quantity of fungibles which have to be identified by separation from a larger mass, as when a man sells a hundred kantars of cotton to be separated from a thousand kantars which he owns, or, as is more usually, the case, sells a hundred kantars of cotton which he has yet to procure, that the question of determination is so important. We must not confuse two different things. If I buy a hundred yards of a particular kind of cloth the object is determinate. The seller's obligation is not void for want of an object.

But it by no means follows that the property in a hundred yards of cloth passes to me. The full explanation of this matter belongs to the law of sale.

It is sufficient to say here that under the French law the property does not pass to the buyer until the things sold have been weighed or counted or measured, and the risk does not pass to

him until the same time. In Quebec the French rule is followed that identification without delivery is sufficient to pass the property. (See *Villeneuve v. Kent*, 1892, R. J. Q. 1 Q. B. 136; *Church v. Bernier*, 1892, R. J. Q. 1 Q. B. 257.)

Under the Egyptian Code the property does not pass to the buyer until the things sold have not only been separated from the bulk by weighing, counting, or measuring, as the case may be, but have actually been delivered to him. (C. C. E. 268, 338.) Until then the things sold are the property of the seller and if they perish before delivery he must procure other kantars, other gallons, other yards, or whatever the unit may be—*genus nunquam perit*.

△ There is one case in which the rule may press hardly on the buyer. This is when the seller becomes insolvent after the sale but before delivery. In that case the things sold belong to his creditors and the buyer has only a personal claim for their value.

△ In the sale of fungibles it is not essential that the quantity should be expressly mentioned if it is capable of being ascertained. It is enough that the contract contains such indications as will enable the court to decide what quantity was intended by the parties. For example, I may contract to pay at a certain rate for as much coal as my furnace may require for a winter, or as much wine as I shall require for a dinner, and in either case the amount required can be ascertained afterwards. (B.-L. et Barde, 1, n. 284; Planiol, 2, n. 1005.)

The nature of the contract, the usage of trade, the position of the parties, and the circumstances generally may make it possible to enable the court to determine the quantity intended.

Question of determination in contracts other than sale.

It is in regard to the sale of fungibles that the question of determination generally arises. But occasionally in other classes of contracts there may be a question whether the object is sufficiently determined. In a French case the father of an illegitimate child promised the mother to pay her an annual sum for the maintenance and education of the child and a capital sum at a certain date. The court held that although neither the annual sum nor the capital sum was stated they had power to determine the amount in each case looking to the circumstances and position of the parties. (Orléans, 2 mars 1881, D. 82. 2. 244. As to the natural obligation by the French law see Paris, 30 juin 1893, D. 94. 2. 526; *supra*, p. 32.)

The cause here is not unlawful because it is to make reparation for a wrong done, so far as it can be considered as conferring a benefit upon the mother of the child, and as regards the child itself there is not only a lawful cause for the father's obligation, but there is more, there is a natural obligation to provide for the child. (Grenoble, 23 janv. 1864, D. 64. 5. 254; B.-L. et Barde, I. n. 310, note 1. See *supra*, p. 32.)

The real difficulty of the case lies in the question if the object is sufficiently determinate. The amount of the annual alimony is not stated, and all that is said about the capital is: *je paierai à l'enfant un capital à la mort de mes parents*. It is possible that the court had enough indications of the position of the parties and of the sum required to bring up the child to enable them to say that the contract itself contained the materials for the determination of the object so far as the annual payments were concerned. But, seeing that there was nothing said as to the purpose to which the capital was to be destined, such as that it was to be for a *dot*, or for some other special purpose, it seems difficult to see upon what ground the court was entitled to fix, as it did, this capital sum at 5,000 francs.

(d) Possibility of transfer.

It must be possible to transfer the thing from one of the parties to the other.

There can be no valid obligation by A to transfer a thing to B if this is an impossible thing to do. If, for example, A sells to B a thing which unknown to both of them belonged to B already, the sale is void for want of an object. (Beudant, *Vente*, n. 101.)

2. Obligation to do.

In this kind of obligation the act which the debtor promises, and under the term "act" is included an abstention, must possess the following qualities:—

(a) The object must be possible.

In saying, as the codes do, that the object must be possible it is meant that there can be no lawful obligation to perform a thing which it is absolutely impossible for anyone to perform—*à l'impossible nul n'est tenu*. (Pothier, *Oblig.* n. 136; C. C. E. 95 149; C. C. Q. 1062.) An obligation to jump over the moon or to swim across the Atlantic would be a nullity.

But what is impossible to-day may be possible to-morrow. Not many years ago a promise to fly over the English Channel would have been a promise to do a thing absolutely impossible. Now such a flight is an everyday matter.

And relative impossibility is not enough. If a man binds himself to do something which is a possible thing to do, although he is not able to do it, there is no reason why he should not pay damages for entering into so foolish a contract. If a man who does not know a note of music undertakes to write an opera within a week, or to pay a penalty, there is no reason why he should not be held to his contract. The nature of the contract under these circumstances may lead the court to hold that it was meant as a joke, in which case it will not be enforced. But if it appears to have been seriously meant the contract will be binding. (Larombière, *Oblig.* art. 1128, n. 5.) When the other party knew or ought to have known of the impossibility this will generally be enough to exclude the idea of a serious contract. (B.-L. et Barde, 1, n. 289; *Pand. Franç. Oblig.* n. 7655. Cf. German Code, art. 307.)

(b) The object must be lawful.

A promise to do anything which is forbidden by law cannot be enforced and we may say that both the cause and the object are here unlawful. Or another way of reaching the same result is to say that an unlawful act cannot be an object of commerce. Nor is it necessary that the act should be expressly forbidden; if the promise is to do something unlawful or immoral it will not be enforced. (See *infra*, p. 114.)

(c) Object must be personal to the debtor.

By this is meant that it is only a person who has given his consent to be bound by a contract who is bound by it. If A undertakes that B shall do something, then unless he had B's authority to act for him, B is not bound. Nor is A bound either, because he did not undertake to do anything. But there is nothing to prevent A agreeing that if B does not do what A has undertaken that he shall do, or at any rate that if B does not take over the obligation and agree to be bound, he, A, will pay the damages. This is called the promise *de se porter fort*. It will be explained later in speaking of the effect of stipulations on third parties. (*Infra*, 2, p. 48.)

(d) The creditor must have an interest in enforcing the contract.

This last requisite will not be considered here at length as it belongs rather to the law of procedure. It is a fundamental rule of procedure that the plaintiff must have an interest in the result of the suit. *Pas d'intérêt, pas d'action*. (Garsonnet et Cézair-Bru, *Précis de Procédure Civile*, 7th ed. p. 73.) The older view was that the creditor who sued for fulfilment of the contract, or for damages for its breach, must show that he had a pecuniary interest, though when the action was for damages based on a wrong it was sufficient to show moral damage, such as injury to reputation or feelings. The tendency of recent cases in France is not to make this distinction, but to take account of moral damage in cases based on contract as well as in those based on delict or quasi-delict. (See Planiol, 2, n. 1,000, and n. 252; B.-L. et Barde, 1, n. 293; Dorville, *De l'intérêt moral dans les obligations*, thèse, Paris, 1901; Demogue, R., *Notions fondamentales du droit civil*, p. 186; Ihering, *Oeuvres Choiesies*, 2, p. 145, for a full examination of the subject in the Roman law and the German law. *Infra*, 2, p. 252.)

CHAPTER IV.

DEFINITION OF CONTRACTS AND KINDS OF CONTRACTS.

In its arrangement of this subject the Egyptian Code has departed very much from the French model.

The French Code begins with contracts and explains their formation, the requisites for a valid contract, and so on, and then discusses further on the different kinds of obligations such as conditional, joint and several and the like.

The Egyptian Code attempts a more scientific plan.

It states in its first chapter the rules which apply to obligations in general, and in its second chapter the rules which apply to contracts or obligations created by agreement. But, as a matter of fact, although the statement of the law as to alternative obligations, obligations with a term, etc., is given in chapter I, these forms of obligations arise from contract and it would have been better to have put them in the chapter which deals with contract. It is inadvisable to explain the legal effects of a contract under which there is an option, or in which the debtor is bound only subject to a condition, and so forth, until we have first explained what a contract is and how it is created, and we shall begin, therefore, by explaining contracts.

Definition of contract.

The French Code contains at the beginning of its treatment of contracts a chapter headed "Preliminary Dispositions," containing a definition of contract and also definitions of certain special kinds of contracts, viz., bilateral, commutative and onerous, as contrasted with unilateral, aleatory and gratuitous. (C. C. F. 1101-1107.) Neither the Code of Quebec nor the Egyptian Code contains these preliminary dispositions, not because there is any difference in the law, but because in the view of the legislator theoretical definitions are out of place in a code; a code is intended to lay down only the rules of positive law.

The definition of contract given in the French Code is: *An agreement by which one or more persons bind themselves in favour*

of one or more persons to give or to do or not to do something.
(C. C. F. 1101.)

Convention and contract.

This definition is taken from Pothier, and it is meant to indicate that an agreement or convention is not necessarily a contract. (*Oblig.* n. 3.) A contract is a special kind of agreement the effect of which is to create an obligation between the debtor and the creditor. There is always something left over which the debtor has to perform.

An agreement of which the object is not to create a contract but to extinguish or modify a contract which already exists between the parties Pothier does not call a contract but a convention. It is only the creative agreement which is a contract. The distinction is a sound one, though perhaps not very important. Some modern writers and some of the codes reject it and consider the release of a debt as itself a contract. (See Huc, 7, n. 3; German Code, art. 397; Saleilles, *Théorie générale de l'Obligation*, 3rd ed. p. 123. Cf. Planiol, 2, n. 943; B.-L. et Barde, I. n. 7.)

The point which Pothier was anxious to emphasise is that in a contract the debtor must intend to give the creditor a legal claim against him; the intention of the parties is to create a *lien de droit*.

Contract must affect legal rights.

There may be an agreement which has all the outward marks of a contract but it will not be enforced by the courts because the parties who made it did not intend thereby to affect their legal relations. An invitation to dinner may be made and accepted in the most formal way, but if the guest does not appear at the time appointed, he will not be liable in damages, however glaringly disingenuous his excuse. He intended to contract a social engagement and not a legal engagement.

Or, to give Pothier's illustration, a father says to his son who is a student: "If you work hard during the session I will give you money to travel with during the vacation."

The father may be quite sincere in his promise, but he does not intend to give his son a legal claim against him and no such claim is created. (*Oblig.* n. 3.)

In a Belgian case an official was asked by his superior officer to do some extra work. The superior told him he would see he

got special remuneration for it. The official failing to get this remuneration brought an action against both his superior and the government, and it was held he had no legal claim against either.

The government had made no contract with him at all, and the superior officer had not intended to bind himself but had meant only that he would recommend payment for the work. (Cass. Belge, 2 déc. 1875, *Pasicrisie Belge*, 76. I. 137.)

Savigny has the merit of having produced the clearest analysis of contract.

His definition is: "the agreement of several persons in a declaration of their joint intention for the purpose of creating an obligation between them." (*Obligationrecht*, 2, p. 8.)

The following is suggested as simpler.

"A contract is an agreement by which one person gives to another a legal claim against him which this other accepts." There must be consent; there must be at least two persons; there must be an outstanding claim contemplated. The claim must be one which the law will enforce.

Contracts of good faith.

In French law all contracts are contracts *bonæ fidei*.

The Roman law made a distinction between contracts *stricti juris* and contracts *bonæ fidei*, the courts having less freedom of interpretation and less power to admit equitable defences in the former class than in the latter. (See Girard, *Manuel*, 5th ed. p. 438; Maynz, *Cours de Droit Romain*, 2, p. 132.) But no such distinction is made in the French law. (Pothier, *Oblig.* n. 9. *Infra*, p. 359.)

Bilateral and unilateral contracts.

The French Code says: *a contract is synallagmatic or bilateral when the contracting parties bind themselves reciprocally the one to the other. It is unilateral when one or more persons are bound in favour of one or more other persons without there being any engagement on the part of the latter.* (C. C. F. 1102-1103.) There is no merit in the word "synallagmatic" because the Greek word "synallagma" means simply a contract. It is better to use the term "bilateral" to indicate the two-sided character of these particular contracts. In the language of the *Cour de Cassa-*

tion the essential character of such contracts is to engender at the same time two principal and correlative obligations of which the one is the cause of the other. (Cass. 23 avr. 1877, D. 77. 1. 366.)

In a bilateral contract each party is at the same time debtor and creditor. He owes certain prestations and in return he can claim certain prestations from the other party. The obligations contracted by the one are, so to speak, conditional on those contracted by the other. Such contracts are sale, exchange, lease, partnership, and many others. In most agreements of an anomalous character there are in this way obligations on the one side which are to be balanced against obligations on the other. If, for instance, we look at the title of sale in the French Code or in the Code of Quebec we find a chapter headed "Of the obligations of the seller," and the following chapter headed "Of the obligations of the buyer." (C. C. F. 1602, 1650; C. C. Q. 1491, 1532.)

In like manner the obligations and rights of the lessor are balanced against the obligations and rights of the lessee. (C. C. F. 1719, 1728; C. C. Q. 1612, 1636.) The arrangement of the Egyptian Code does not show this so clearly. (C. C. E. 266, 362/336. 445.)

In sale the seller is bound to deliver the thing sold and to give certain warranties. The buyer is bound to pay the price. We cannot say that either party is more a debtor or more a creditor than the other. The seller is a debtor as regards the obligations to deliver and to warrant, but he is a creditor as regards his right to claim the price. Conversely, the buyer is a debtor as regards his liability for the price, and a creditor as regards his claim for delivery of the thing and for warranty. Similarly with the lessor and the lessee. With contracts of this class we must contrast the unilateral contracts. In them one party is a debtor purely and simply, and the other party is a creditor purely and simply.

There are no reciprocal rights and duties; the rights are all on one side and the duties are all on the other side. The best example is the contract of donation. The donor binds himself to give, and the donor is a debtor, the donee is a creditor. But the donor has no action, he does not need one; the donee owes him nothing and has come under no obligation to him. The obligations are all *ex uno latere*, on the side that is of the donor. So, if one party gives the other an option to buy his property

which the other accepts, the party to whom the option is given does not bind himself to anything. The same may be the case in a contract of sale on approval—*vente à l'essai*—but this is a question of interpretation. In most cases the buyer is bound at least to make a trial of the thing. (B.-L. et Saignat, *Vente*, 3rd ed. n. 169.)

It must not be forgotten that the unilateral contracts are contracts which require consent for their formation just as much as other contracts. The creditor in them does not bind himself to do or to pay anything, but it is his acceptance which makes the legal tie. (See C. C. E. 48/70; C. C. F. 894; C. C. Q. 755; B.-L. et Colin, *Donations*, 1, n. 13.)

As examples of unilateral contracts two Quebec cases may be given. A printer contracted with the government of Quebec to print certain public documents at stipulated rates. After a change of ministry, the new minister refused to send the printer any more work. The printer sued for damages for breach of contract. (The form of action, viz. "petition of right," does not concern us.) It was held that according to the terms of the contract the printer came under obligations. But the government had not bound itself to give the printer all or any of the printing work referred to. There was nothing in the contract to prevent them giving the whole of the work to any other printer. Under this agreement the government had no duties actual or contingent; it could remain completely inactive and the other party had no redress. (*Regina v. Demers*, 1900, A. C. 103, 69 L. J. P. C. 5, in the House of Lords, *Demers v. la Reine*, 1898, R. J. Q. 7 Q. B. 433.)

In the second case a man ordered law books from a traveller for a law publisher.

The following day he telegraphed to the publisher revoking his order. It appeared that the traveller had no authority to make an absolute sale.

He could take orders, but his principal had power to decide whether he would accept them or not. Notwithstanding this limitation of the power of the traveller, the Court held that he had power to accept the offer of the buyer. There was a unilateral promise to buy accepted by the traveller but not accompanied by a promise to sell.

Accordingly it was held that the purchaser could not revoke his order. (*Théoret v. Morency*, 1905, R. J. Q. 27 S. C. 150. Cf. Dijon, 19 juillet 1911, D. 1913. 2. 270.)

Imperfectly bilateral contracts.

There is an important class of contracts which the older writers placed in a category between the bilateral and the unilateral contracts, and designated as contracts which were imperfectly bilateral or imperfectly synallagmatic. These were the contracts which were unilateral at the date of their formation but in which, from some unforeseen cause, a duty on the part of the party who had no obligations to begin with might afterwards spring up. Primarily, the obligations are all on one side, but circumstances arising after the date of the contract may create obligations on the other side also. If I lend you a book it is very unlikely that you will ever have or need any action against me.

In delivering the book I have done all that I was bound to do. The only obligations left over are those of the borrower to take care of the book and to return it. But if I had just recovered from smallpox and had been using the book during my illness, and in consequence of my carelessness in lending you an infected book you contracted the disease, you would have an action of damages. Or, to take an illustration from the Roman law, if a man lends to another vessels for holding wine or oil which he knows to be defective, and the wine or oil is thereby spilt or lost the lender is liable in damages. (Dig. 13. 6. 18. 3.)

The French Code has an article: *Lorsque la chose prêtée a des défauts, tels qu'elle puisse causer du préjudice à celui qui s'en sert, le prêteur est responsable s'il connaissait les défauts et n'en a pas averti l'emprunteur.* (C. C. F. 1891.) In the English law there is a liability when the lender wilfully or by gross negligence omits to inform the borrower of the danger.

In a recent case a borrower sued for damages on the ground that an engine which had been lent to him had exploded and caused injury, and although the lender was excused from liability this was on the ground that he did not know of its defective condition. (*Coughlin v. Gillison*, 1899. 1 Q. B. 145, 68 L. J. Q. B. 147.)

Similarly, in deposit or gratuitous mandate there is at first no obligation created on the part of the depositor or the mandator. It is only in the event of the depositary or the mandatary incurring expense or suffering loss in consequence of the contract that an action arises in his favour against the other party.

It is true that in these contracts such an action will arise much more commonly than in the case of a gratuitous loan of a specific

thing. But there are many contracts of deposit and mandate which remain purely unilateral. (See Req. 23 avr. 1877, D. 77. 1. 366, S. 78. 1. 299, Journal du Palais, 1878, p. 1052.)

The question which divides the French authors is whether contracts of this kind which are unilateral in their inception but in which a liability on the other side may spring up afterwards, should be classed as unilateral:—

Pothier classed them as bilateral though he calls them *moins parfaitement synallagmatiques*. (*Oblig.* n. 9.) But many modern writers include them among unilateral contracts. They urge that in judging of the category to which a contract belongs we must look at it when it was formed. In these contracts the obligations, if any, of the lender, the depositor, and so on, do not arise from the contract itself but from some accidental fact occurring afterwards which would have given a right to the other party even if there had been no contract at all. (Planiol, 2, n. 950; B.-L. et Barde, 1, n. 11; Laurent, 15, n. 435; Colin et Capitant, 2, p. 279. *Contra*, Aubry et Rau, 5th ed. 4, p. 469; Cassin, R., *de l'Exception tirée de l'Inexécution*, p. 451.) The sounder view seems to be that these contracts are unilateral. It is confirmed by the history. In the Roman law there was a time when such contracts as loan were absolutely unilateral and even supervening events did not make them bilateral.

The so-called “contrary actions” in favour of the borrower, the mandatary, etc., based upon some special circumstances, were of later introduction. (See Pernice, *Labeo*, 2, 1, p. 257; Maynz, *Cours de Droit Romain*, 4th ed. 2, p. 142.)

And it may be pointed out that under the contract of donation, which is unquestionably unilateral, there may nevertheless be a supervening liability on the part of the donor. In the case of the book infected with smallpox, a person who wilfully or by gross negligence gave it to another would be liable in the same way as if he had lent it. (B.-L. et Colin, 1, n. 1346; Laurent, 12, n. 388; German Code, 521; Swiss Code, *Oblig.* 248. See for this rule in the English law, *Gautret v. Egerton*, 1867, L. R. 2 C. P. at p. 375, 36 L. J. C. P. at p. 193.)

Importance of distinction between bilateral and unilateral contracts.

Tacit resolutory condition.

In the French Code there are certain articles which lay down special rules as to synallagmatic contracts. (C. C. F. 1184, 1325.) These special articles do not occur in the Quebec Code or the Egyptian Code. But in regard to one of them (C. C. F. 1184) there does not appear to be any intention to change the law. (Mignault. *Droit Civil Canadien*, 5, p. 450; Halton, 1, p. 328.)

This is the article which says that the resolutory condition is implied in synallagmatic contracts.

It is, in fact, a general rule of law that where there are reciprocal obligations and one party has performed, or is willing to perform, his part, whereas the other party has failed to perform his part, the first party may demand that the contract be set aside. This is in virtue of what is called the tacit resolutory condition; the basis of the claim is the reciprocity of the obligations. The one party performed his part on the implied condition that the other party would make the counter-performance. And if this does not follow, he can ask for the dissolution of the contract. But the contract is not dissolved *de plein droit*. The creditor who desires to have the contract set aside on this ground must prefer a formal demand of execution upon the debtor and in default of such execution obtain a judgment of the court that the contract is dissolved. The judgment will also give him damages if any.

The creditor, of course, is not bound to ask for dissolution of the contract. He can ask for its performance instead, and, where specific performance can be made, he will probably prefer this remedy. But whether he asks for dissolution of the contract or for its execution he must begin by showing that he is not to blame; that he has done or is ready to do what he promised.

He cannot break a contract himself and then complain of its breach by the other party. Such an unjust claim might in the Roman law be met with what was known as the *exceptio non adimpleti contractus*, which was one form of the *exceptio doli*. (Dig. 19. 1. 13. 8. See *infra*, 2, p. 222.)

The German Code has an express provision to this effect (art. 320). But there is no doubt that it is a principle of the

French law though it is not stated in express terms in the code. (Planiol, 2, n. 949; and *dissertation* in note to D. 98. 1. 289, note 1; B.-L. et Barde, 1, n. 11; *Pand. Franç. Oblig.* n. 946; Saleilles, *Théorie Générale de l'Obligation*, 3rd ed. n. 168; Demogue, R., *Rev. Trim.* 1907, p. 815; Cass. 4 janv. 1910, D. 1913. 5. 5; and, especially, Cassin, R., *de l'Exception tirée de l'Inexécution*, Paris, 1914. See *Grange v. Macleannan*, 1883, 9 Can. S. C. R. 409; *Boswell v. Kilborn*, 1862, 15 Moore, P. C. 309.) So, to take a Quebec case as an illustration, under a policy of fidelity assurance by which the assured is bound to keep strict watch over the employed and to see that his accounts are duly kept and so on, the assured cannot sue for the sum in the policy if he has not kept his part of the contract. (*Comm. d'École pour St. Edouard v. Employers Liability Ass. Co.*, 1907, R. J. Q. 16 K. B. 49.)

When the plaintiff asks for dissolution the court has in France and in Egypt a discretionary power to allow the defendant a delay to enable him to execute his obligation provided this does not cause serious prejudice to the creditor. (C. C. E. 168/231; C. C. F. 1184; *infra*, 2, p. 222.) In Quebec the court has no such power.

Controversy as to tacit resolutory condition in imperfectly bilateral contracts.

According to some French writers the resolutory condition is implied in the imperfectly bilateral contracts as well as in those which are bilateral in the strict sense. (Demolombe, 25, n. 492; Huc, 7, n. 266.) But the more general opinion is that article 1244 cannot be so extended. It speaks of synallagmatic contracts only. (Aubry et Rau, 5th ed. 4, p. 125, note 79; B.-L. et Barde, 2, n. 905.) In the Egyptian Code we are not embarrassed by having an express article and it would seem that the principle may be applied in any onerous contract. The right of retention referred to presently is an example of its application. (See Cassin, R., *De l'Exception tirée de l'Inexécution*, p. 453.)

Whether the tacit resolutory condition exists in principle in the contracts which Pothier calls imperfectly bilateral does not make much difference in practice. The lender, for instance, does not need an action for dissolution of the contract, because his action for return of the thing secures the same end.

Right of retention.

In these contracts where the action for return of the thing is brought by a plaintiff who is himself in breach of some duty under the contract the other party is given by the codes a right of retention of the thing until the plaintiff has fulfilled his legal obligations.

If the lender sues for the thing lent and the borrower has been put to expense in preserving it, he has a right of retention until he has been repaid these expenses. And the same is laid down in regard to deposit and mandate, and, more generally, as to a person called upon to give up a moveable in improving or preserving which he has spent money. It is not necessary here to discuss the slight differences among the codes. (Cf. C. C. F. 1885; C. C. Q. 1770; C. C. E. 605/731, as to the borrower; C. C. F. 1947; C. C. Q. 1812; C. C. E. 488/596, as to the depositary; C. C. F. 1993; C. C. Q. 1713 and 441; C. C. E. 605/731. for the more general rule.)

Express resolatory condition.

This tacit resolatory condition implied in all the bilateral contracts must be carefully distinguished from an express condition which the parties may insert in their contract, declaring that in a certain event the contract shall be dissolved. In this case the happening of the event dissolves the contract *de plein droit*. But, according to the jurisprudence, the clause must be expressed very clearly. (C. A. Alex. 28 janv. 1891, B. L. J. III, 165.)

Sometimes the parties to a contract say that in case of non-execution by one of them the contract shall be dissolved. The courts are inclined to interpret such a clause narrowly regarding it as an attempt to escape from the discretionary power of the court to allow delay, and it appears that unless the parties say that the contract shall be dissolved *de plein droit* they are held merely to have expressed the condition which the law would have implied. (See C. A. Alex. 29 nov. 1902, B. L. J. XV, 11.) If they say *de plein droit* the creditor must serve a summons on the debtor and the judge cannot grant any delay. If they want to make it clear that the contract is to be dissolved *ipso facto* and without the intervention of the court at all, they must stipulate that the contract must be dissolved *de plein droit et sans somma-*

tion, or use equivalent terms. (B.-L. et Barde, *Oblig.* 2, n. 951; Planiol, 2, n. 1324; Halton, 1, p. 329.)

Commutative and aleatory contracts.

The next division of contracts made by the French Code is into contracts which are commutative and those which are aleatory.

According to the definition: *a contract is communicative when each of the parties binds himself to give or do something which is regarded as the equivalent for that which is given or done for him. When the equivalent consists in a chance of gain or of loss for each of the parties, depending upon an uncertain event, the contract is aleatory.* (C. C. F. 1104; Pothier, *Oblig.* n. 13.)

In the commutative contracts each party gets something which is capable of being valued so that we can say at once whether the equivalent is a fair one. In these contracts it is not necessary that one party should be a gainer and the other party a loser.

If I buy at a fair price something which I want, or if I pay a reasonable rent for my house, neither I nor the other party to the contract gains anything at the expense of the other. Each of us gets what he wants.

In the aleatory contracts it is not so. The parties know that they are making a speculation. One of them is going to gain and the other to lose. What each of the parties gets is not anything which can be instantly valued; it is an *alea* or chance. For example, a bet is an aleatory contract. Until an event upon which the parties have staked their money turns out in a certain way, for instance, until a certain horse wins, or does not win a race, we do not know which of the parties is the winner. The character of this species of aleatory contracts has been explained already. (See gaming contracts, *supra*, p. 28.)

Another important class of aleatory contracts is contracts of insurance. The whole business of insurance consists of taking risks, or, in other words, of making aleatory contracts. It is only the fact that if the policies are sufficiently numerous the favourable chances balance the unfavourable, and, indeed, leave a profit, which makes gambling of this kind a safe business. A man takes out an accident policy; he may be fortunate enough to break his neck the next day, and, thereby, cause a serious loss to the company, or he may pay premiums for fifty years and die of old age. The sale of a life-rent or annuity is another example of an aleatory contract. (See Dijon, 22 janv. 1896, D. 96. 2.

325. Neither the Code of Quebec nor the Egyptian Code gives any definition of aleatory contract. The German Code, also, attempts no definition and leaves the courts to determine what is an aleatory contract (arts. 759, 764). The French Code explains it in these terms:

Le contrat aléatoire est une convention réciproque dont les effets quant aux avantages et aux pertes, soit pour toutes les parties, soit pour l'une ou plusieurs d'entre elles dépendent d'un événement incertain. Tels sont :

Le contrat d'assurance,

Le prêt à grosse aventure,

Le jeu et le pari,

Le contrat de rente viagère.

Les deux premiers sont régis par les lois maritimes. (C. C. F. 1964.)

Prêt à la grosse aventure, or more shortly, *prêt à la grosse*, is a good example of the aleatory contract. In this contract the borrower agrees that in the event of a ship or a cargo arriving safely at its destination he will repay the capital of the loan, and, in addition, will pay by way of interest a sum called *profit maritime* or *prime de grosse*.

If, however, the ship or the cargo should be lost, the borrower does not need to repay even the capital sum lent. (Lyon-Caen et Renault, *Manuel de Droit Commercial*, 11th ed. n. 977.)

This article (1964) in the French Code is less accurate than C. C. F. 1104, which says:—

Lorsque l'équivalent consiste dans la chance de gain ou de perte pour chacune des parties, d'après un événement incertain, le contrat est aléatoire.

In spite of what is said in article 1964 it does not make an *alea* that one of the parties has a chance of gain and the other party a risk of loss. It is necessary that each party stands either to gain or to lose according to the issue of the uncertain event.

There must be a gain by one at the expense of the other. For clearly if one party stands to gain the other party must stand to lose. The two things are necessarily correlative. (Planiol, 2, n. 957; B.-L. et Barde, 1, n. 18; Aubry et Rau, 5th ed. 4, p. 472, note *septies*; D. N. C. C. art. 1106, n. 35, and art. 1964, n. 5.)

The object of the aleatory contract is the risk taken.

In a contract of this class it is essential that the parties took a risk of losing. At any rate, the contract fails if they thought there was a risk whereas in fact there was none. This is well shown in the contract of insurance.

When the chance of gain or loss depends on the longer or shorter life of a person, as when a person contracts to pay a life-rent, the parties act on the assumption that the person during whose life the rent is to be paid is alive at the date of the contract. And if, unknown to them, this was not the case the contract would be null. (C. C. F. 1974; C. C. Q. 1905; B.-L. et Wahl, *Contrats Aléatoires*, n. 212. Cf. case of fire insurance, De Lalande et Couturier, *Assurance contre l'incendie*, n. 78.) Every contract must have an object, and in aleatory contracts the object is the taking of a risk or *alea*.

If you sell me your house on condition that I pay a life-rent to your mother, and, unknown to both of us, your mother was dead at the time, I never took any risk at all, though I thought I did.

But where the parties expressly have in view the possibility of the person or thing about which they are dealing being no longer in existence there is nothing to prevent their making this a part of the risk. There is one case in which this is common. This is when a ship is insured while it is at sea. A ship may be insured "lost or not lost." Here both parties contemplate the possibility of the ship being at the bottom of the sea at the date of the contract. (See C. Comm. F. 365; Pothier, *Traité des assurances*, n. 12; Vermond, *Manuel de Droit Maritime*, n. 192; B.-L. et Wahl, *Contrats Aléatoires*, n. 212; C. C. Q. 2498.) It is the same in the English law. (Arnould on *Marine Insurance*, 9th ed. 1, s. 13.)

Upon the distinction between commutative and aleatory contracts it may be pointed out that all the bilateral contracts are commutative, but the two classes are not co-extensive. Not all the commutative contracts are bilateral. A contract may be unilateral and still be commutative. For instance, a loan of money for interest is a commutative contract, for the borrower gets the use of the money and the lender gets the interest as the equivalent. But the contract is still unilateral, because when the lender has handed over the money he has no further obligation to the borrower. (Pothier, *Prêt à Usage*, n. 7; Guillouard, *Du Prêt et du Dépôt*, 2nd ed. n. 72.)

Unimportance of the distinction.

The distinction between commutative and aleatory contracts was formerly of considerable practical importance. By the old French law contracts concerning immoveables could be set aside upon the ground of *énorme lésion* even when the parties were of full age and capacity. But this did not apply, or applied only in extreme cases, when the contract was aleatory, for there it was impossible until the event happened to say whether the price was excessive. (Pothier, *Oblig.* nos. 33, 37, 39; B.-L. et Barde, 1, n. 19.) In sales of immoveables the French law still admits rescission on the ground of lesion when the seller proves that he did not receive as much as five-twelfths of the just value. (C. C. F. 1674.)

And, in such a case, it is still a practical question to decide whether the contract was aleatory. If it was, it cannot be attacked on the ground of lesion. (B.-L. et Saignat, *Vente*, n. 682; Aubry et Rau, 5th ed. 5, p. 177. See Cass. 16 mai 1900, D. 1900. 1. 585.)

But there is no corresponding provision in the Codes of Quebec or Egypt. These laws have rejected the principle that persons who are in the full exercise of their rights need to be protected against their own imprudence by a paternal government. If a man makes a foolish bargain in regard to land he must bear the consequences just as he must bear them if he makes a bad bargain about a horse. (See Reports of Commissioners on Civil Code of Quebec, 1, p. 12, and 2, p. 16; Halton, 2, p. 73; B.-L. et Wahl, *Contrats Aléatoires*, n. 3; Cass. 31 déc. 1855, D. 56. 1. 19.)

Consequently, under these codes, it is seldom a practical question in the courts whether a contract is aleatory or not, though the point may arise when a minor brings an action based on lesion whether this action be, as in Quebec, an action to set aside the contract, or, as in Egypt, an action for a supplement of the price. (C. C. E. 336, 419; C. C. Q. 1002.) It will be difficult for the minor to prove lesion if his contract was an honest aleatory contract, such as insurance.

There are other cases in which it may be important to decide if a contract is aleatory.

In interpreting C. C. M. 330, the Mixed Court of Appeal has held that the prohibition of the sale of a future crop applies only to a sale of an aleatory character, that is when the price was to

be paid irrespective of the quantity of the crop. (C. A. Alex. 15 févr. 1900, B. L. J. XII, 117; *supra*, p. 70.)

And when there is an assignment of claims it may be that the assignee is to take only the chance of recovering them. In this case the vendor does not warrant the existence of the right assigned as he would do if the contract were not of this aleatory character. (See C. C. E. 351/439; C. A. Alex. 17 avr. 1900, R. O. XXV, 273.)

It is not uncommon for a trader to sell his book-debts good and bad at the risk and peril of the buyer. If it happens that the intention of the parties was that the sale was of this aleatory kind, and this is a matter of interpretation, there will be no warranty. (Cass. 24 nov. 1869, D. 70. 1. 19; Req. 5 déc. 1854, D. 55. 1. 57. Cf. Lyon, 2 mai 1856, D. 56. 2. 198; Aubry et Rau, 5th ed. 5, p. 229.)

Gratuitous contracts and onerous contracts.

A gratuitous contract—*contrat de bienfaisance*—is one in which one of the parties procures for the other an advantage for which the latter gives nothing in return. A contract by onerous title is one which obliges each of the parties to give or to do something. (C. C. F. 1105, 1106.)

Donation, loan for use, gratuitous mandate, and deposit are examples of the first class. So also is loan for consumption unless there is a stipulation for interest. Sale, lease, and paid mandate, are examples of the second class. Pothier gives a class of contracts which he calls mixed. This is when the benefactor in a gratuitous contract stipulates for something in return, but something of much less value than what is given. (Pothier, *Oblig.* n. 12; Larombière on art. 1102-1106, n. 7.) But the French Code does not mention this mixed class, and the prevailing view is that every contract must be either onerous or gratuitous. If the charges laid on the donee are of much less value than the benefits which he receives the contract will be regarded as on the whole a gift, just as, conversely, if a contract is mainly onerous but has an element of donation in it, it will be treated as onerous. The preponderating element will absorb the other. (Demolombe, 24, n. 25; B.-L. et Barde, I, n. 16; B.-L. et Colin, *Donations*, 2nd ed. I, n. 16, and n. 1136. Cf. Cass. 28 oct. 1895, D. 96. 1. 497.)

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Importance of the distinction.

If it is a matter of practical importance to decide whether a contract is gratuitous or onerous this will generally be so for one of the following reasons:—

(1) A gratuitous contract being made from favour to a particular person will be set aside if there be error as to the person. The identity of the person in such a contract is a principal consideration for making it. (Demolombe, 24, n. 111; D. *Rép. Oblig.* n. 120. See Aix, 30 nov. 1882, D. 83. 2. 245.)

On the other hand, in many onerous contracts the identity of the person with whom one is dealing is immaterial. If I buy goods for cash the seller cannot excuse himself from delivery by saying he mistook me for someone else.

(2) When loss is caused by one who is acting gratuitously, and discharging an office of friendship, the court will be disposed to moderate the rigour of the liability arising from his negligence or fault. (C. C. E. 485, 521; C. C. F. 1992; C. C. Q. 1710.) In some cases special authority to do so is given by the codes. Thus, in regard to the mandatary, a different standard is to be applied if the mandate is gratuitous.

The gratuitous mandatary is liable only for gross fault. (C. C. E. 521, 638.) But in other cases when there is no provision in the code it will be always a fact which a court may properly take into account that the debtor was acting for nothing. (C. C. F. 1137; B.-L. et Barde, 1, n. 352, and n. 358; Aubry et Rau, 5th ed. 4, p. 164, note 29; Larembière on art. 1137, nos. 3 and 4.)

(3) When an insolvent debtor makes a gratuitous contract the law presumes that he does so in order to defraud his creditors. A man who cannot pay his debts has nothing which he can honestly give away. (See C. C. E. 143, 204; C. C. F. 1167; C. C. Q. 1034; C. A. Alex. 12 févr. 1896, B. L. J. VIII, 116; Halton, 1, 344; Planiol, 2, n. 323; *infra*, 2, p. 108.)

(4) Deeds containing gifts must be made and accepted in official form, and gifts of immoveables, if they are to be secure from attack by third parties, must be registered. (C. C. E. 48, 52, 70, 75; C. C. F. 931; C. C. Q. 776.)

Difficulty in some cases of distinguishing between onerous and gratuitous contracts.

It is sometimes difficult to decide whether a contract is onerous or gratuitous. When the contract procures an advantage to each of the two parties it is not necessary, in order to make the contract onerous, that the two prestations exchanged should have a pecuniary character; the contract may be onerous though the only advantage gained by one of the parties is moral. (Cass. 19 juill. 1894, D. 95. 1. 125, and the references; Trib. Civ. de Langres, 15 mars 1900, D. 1900. 2. 422.)

If a contract is truly onerous, though upon its face it appears to be a gift, it will not be set aside because it was not made in notarial form or was not registered. The following cases illustrate this rule.

The Municipal Council of Marseilles offered Napoléon III. a free site to build a palace. The offer was accepted and the palace was built. After the fall and death of Napoléon the Council sued the Empress Eugénie for restitution of the site on the ground that this was not really a gift. The Council of Marseilles, when they offered the site, hoped that the occasional presence of their Emperor would increase the prosperity of their city, and the Emperor on his part was bound to build a palace; he could not have taken the land and applied it to another purpose. It was an innominate contract of the type *do ut facias*. (Aix, 30 nov. 1882, D. 83. 2. 245.)

In a Quebec case a man conveyed certain land to a railway company for a nominal price. The conveyance was by private writing and the deed was afterwards challenged as being a gift and void because not in notarial form, but it was held that here also the donor expected a *quid pro quo*. He did not give the land from a spirit of benevolence, but because he thought the making of the line would increase the value of the rest of his property. (*Turriff v. Cie. de Québec Central*, 1893, R. J. Q. 2 Q. B. 559.)

In France there has been much dispute as to whether a provision made by an insolvent father for his daughter at her marriage is to be regarded as onerous or gratuitous. There is considerable French authority for the proposition that if the daughter or the son-in-law was not aware of the insolvency of the donor it is an onerous contract which the father's creditors cannot challenge.

It is argued that in providing a *dot* the father is discharging w.

a moral duty, but it seems a curious view of duty to say that he is entitled to take a *dot* for his daughter out of the pockets of his creditors. (See D. N. C. C. art. 1167, nos. 183 *seq.*; B.-L. et Barde, 1, nos. 673 *seq.*; Cass. 18 déc. 1895, D. 98. 1. 193. *Infra*, 2, p. 116.) The question, however, does not concern us here.

Just as what appears to be a gift may be held to be in reality an onerous contract, so what appears to be an onerous contract may be in reality a gift. The parties to a gift may clothe the gift in the form of a sale or of some other onerous contract. Can such a *donation déguisée* be set aside if not made in notarial form and registered? This subject has been discussed in speaking of the effects of stating a simulate cause in a contract. (*Supra*, p. 54.)

Nominate and innominate contracts.

The French commentators generally retain this division of contracts applying the names which are taken from the Roman law, though there is not in the French law the same importance in the distinction. In the Roman law an innominate contract was not consensual. Until one of the parties had executed it either of them could resile from it. And the party who had made the performance had the option either of claiming execution or damages, or of asking for resolution of the contract and for restitution of his prestation if that was materially possible. (See Girard, *Manuel*, 5th ed. p. 587.) In the French law there are no such rules. All contracts, whether they have a special name or not, are binding by the mere consent of parties unless they are contracts which by law require to be made in some special form, or contracts which only arise in consequence of the delivery of an article, or unless they are unlawful. The French Code has an article which lays down this rule in a rather obscure way. *Les contrats soit qu'ils aient une dénomination propre, soit qu'ils n'en aient pas, sont soumis à des règles générales, qui sont l'objet du présent titre.* (C. C. F. 1107.) The Codes of Quebec and of Egypt have not introduced this article, and it is indeed unnecessary.

In the French law by "nominate" contracts is meant such contracts as sale, and others which are distinguished by separate names and are dealt with specially in separate parts of the code. When the contract is one of sale and the court has to interpret it, it will look first under the head of sale for the provisions which,

apply. It is only when these provisions do not supply the answer that it is necessary to turn to the general rules applicable to contracts as a whole. But parties are free to make any contracts which are not contrary to public policy and good morals, whether such contracts fall under any of the named categories or not. A contract is not null because it is neither a sale nor a lease, nor, in fact, any one of the specially named contracts. If such a contract on the whole resembles sale it will be construed first in the light of the rules of sale. If it has no particular resemblance to any of the named contracts it will be interpreted by the general rules of interpretation applicable to all contracts alike. (Laurent, 15, n. 444.) The books are full of such anomalous or innominate contracts.

Many contracts which at first sight might appear to be contracts of sale or lease, are upon closer examination found to contain implied terms and conditions which differentiate them from normal contracts of that class. For example, such a common contract as that by which an artist undertakes to paint a portrait for a fixed price has been held by the highest court in France to be an innominate contract with quite peculiar incidents. (Cass. 14 mars 1900, D. 1900. 1. 497.) And the contract between the sitter and the photographer, whether we regard it as a sale or as a hiring of services, similarly contains implied terms of a peculiar nature, and, although the photographer is the owner of the negative, he cannot without the consent of the sitter sell or exhibit copies of the photograph. (Pouillet, *Traité de la Propriété Littéraire*, 3rd ed. n. 284; *Pand. Franç. vo. Prop. Litt.* n. 222. Cf. Pollard v. *Photographic Co.*, 1888, 40 Ch. D. 545, 58 L. J. Ch. 251; *Boucas v. Cooke*, 1903, 2 K. B. 227, 72 L. J. K. B. 741. See *infra*, pp. 381 seq.)

Two examples of innominate contracts may be given. In one the trustees of a hospital contracted with a medical school to place a certain number of beds in the hospital at the disposal of the medical school for clinical instruction. No term was specified, and it was held that the contract was not a lease nor a sale nor a servitude, but was an innominate contract to do something, and as no period was specified the presumption was that the obligation was intended to be perpetual. This is a very unusual example of a personal obligation being held to be perpetual. (Douai, 25 févr. 1903, D. 1904. 2. 173.)

In an Ontario case decided on appeal by the Supreme Court of Canada, a contract bearing much resemblance to sale was held

to be an innominate contract. X, a manufacturing furrier, supplied furs to Y, a retail trader. The agreement was that the retail trader might sell what furs he pleased at a price not below that named in a list, and was to remit this sum within 24 hours after each sale to X. What Y charged over and above this price he was to keep. X was to have the right to withdraw any of the furs at any time, and all furs unsold were to be returned at the end of the season. Y became bankrupt, and his creditors claimed the furs which were in his possession under this agreement.

It was held, however, that X had not parted with the property. He had given Y a *jus disponendi*, and, so far, this looked very like a contract of sale. On the other hand Y's *jus disponendi* was not to be an exclusive one; X might withdraw any furs when he liked. This was quite inconsistent with the theory that Y had become the owner. It was not a contract of sale. (*Langley v. Kahnert*. 1905, 36 Canadian Supreme Court Reports, 397. See, for another good example of an innominate contract resembling sale, C. A. Alex. 7 juin 1900, B. L. J. XII, 313.) It is important to bear in mind that the name which the parties have given to their contract is in no way conclusive as to its true nature. They may either from ignorance or design have chosen to call a contract by a name which does not correspond with their real intention. But the duty of the court is to give effect to the genuine intention of the parties. (B.-L. et Barde, 1, n. 20; Cass. 24 déc. 1887, D. 88. 1. 256.) This will be explained fully under the head of the interpretation of contracts.

Principal and accessory contracts.

Accessory contracts are such as are intended to secure other contracts. Such contracts as pledge, hypothec, or suretyship cannot exist by themselves. They exist to support or guarantee another obligation. And the moment it is shown that there is no valid principal obligation, or that it has been extinguished, the rule is that the accessory obligation falls to the ground. (See C. C. E. 496/605, 540 662; C. C. F. 2012; C. C. Q. 1932; C. C. F. 2079; C. C. Q. 1972; C. C. F. 2038; C. C. Q. 1960; C. C. F. 2180 (I); C. C. Q. 2081, n. 5; B.-L. et Barde, 1, n. 24.)

But in the French law the principal obligation to be secured is not necessarily a civil obligation. A natural obligation may

be guaranteed in this way also. It is so likewise with the obligation of a minor, or of some other person who by law can bind himself, but has a right to challenge the contract if he chooses to do so, and in this case the accessory obligation does not fall if the challenge succeeds. This is because the nullity of such an obligation is relative and not absolute; that is, it is intended for the protection of the person subject to the incapacity, and not for that of the capable person who has undertaken the risk of a surety. (C. C. F. 2012, 1125; C. C. Q. 1932, 987; D. N. C. C. art. 2011, n. 24.) In the Egyptian law it might be argued, on a strict interpretation of the codes, that though an obligation voidable by reason of the incapacity of the debtor may be secured by an accessory obligation, no other obligation can be so secured except one which is civilly binding. (C. C. E. 496/605.)

But, probably, this is not meant. The Egyptian Codes intend to recognise natural obligations and do not consider them as void, though they are unenforceable by action. (See Grandmoulin, *Suretés personnelles*, etc. n. 33. and, *supra*, under Natural Obligations, p. 38.)

Consensual, formal and real contracts.

Although, in principle, all contracts are consensual in the modern French law, there are, nevertheless, certain of them in which the consent has to be expressed in a certain form on pain of nullity. In the absence of the prescribed form neither party is bound. The technical name for such contracts is *contrats solennels*. Com

In the Roman law the *stipulatio* was an example of a special form of words making the agreement binding. The creditor must put the verbal question and the debtor must give the affirmative answer, e.g. *Spondeo? Spondeo*. (Girard, *Manuel*, 5th ed. 485.) En

In the modern codes there are no special words or phrases which are sacramental, that is, which are prescribed as essential to the validity of any contract. Probably, this is so in the Mohammedan law also, though there is controversy as to whether certain special words are necessary for the creation of marriage. (Zeid Bey, *Sharh el Ahwal el Shakhisia*, 1, p. 12.) But, however this may be, what is meant in the French law by saying that a contract is formal or solemn is that some form, though not

the use of any particular words, is prescribed as essential. Gifts of immoveables and hypothecs must be made by an official instrument—*acte authentique*. (C. C. E. 48/70, 557/681; C. C. F. 931; C. C. Q. 776; C. C. F. 2127; C. C. Q. 2040.)

And under the French Code and the Code of Quebec marriage contracts likewise must be made in notarial form. (C. C. F. 1394; C. C. Q. 1264.) The requirement of a particular form as essential to the existence of a contract is to be carefully distinguished from the case in which it is said that the contract can only be proved by writing.

Where writing is required only as matter of proof, and the parties come to an agreement verbally, there is a contract between them, though it may be impossible to prove it. For example, the provision that contracts of which the value exceeds a certain amount can only be proved by writing is merely a rule of evidence. There is a contract without writing if the parties have so agreed. If the defendant can be got to admit its existence, as, for instance, by the tender of an oath, the contract is perfectly valid. (See C. C. E. 215/280; C. C. F. 1341.)

But when the law says that a contract can only be made in a certain way, there is no contract at all unless this condition is satisfied. (B.-L. et Barde. 1, n. 22; Planiol. 2, n. 973.)

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There are certain contracts which by their nature arise only upon the delivery of a thing.

According to the Roman law the contracts of loan, in its two varieties of loan for consumption and loan for use, the contract of deposit, and the contract of pledge came into existence only by delivery of the thing lent or deposited or pledged.

The only right of action which arose out of the contract was the action for the restitution of the thing, and an action for restitution presupposes that the thing to be restored is in the hands of the debtor. In like manner the French Code and the Code of Quebec say of deposit and of pledge that the contract is complete only by delivery. (C. C. F. 1919; C. C. Q. 1797; C. C. F. 2071; C. C. Q. 1966.) And they say of loan that it is a contract by which the lender gives something to the borrower to be returned. (C. C. F. 1875; C. C. Q. 1763. See D. N. C. C. art. 1107, n. 16.)

The Egyptian Code, though less clear, is to the same effect.

(C. C. E. 464/565, 467/568, 482/590, 540/662.) But in the Roman law there was this important difference that an agreement to lend or to pledge or to make a deposit was not binding; it was a mere pact. (Girard, *Manuel*, 5th ed. p. 436.) In the modern law this is not so. The contract of loan or deposit in the strict sense does not arise until the thing has been delivered. But the promise to lend or to make a deposit is, if accepted, a binding consensual contract. In a loan there are, therefore, two successive contracts: (1) the consensual contract to make the loan, which is a unilateral contract creating an obligation on the part of the lender only, and (2) the real contract which comes into existence when the thing is delivered, and is a unilateral contract creating an obligation on the part of the borrower only. The lender's obligation to lend is extinguished when the delivery is made, and the borrower's obligation to return the thing lent comes into existence. In the contract of deposit there is (1) a promise by the future depositary to receive the thing, an obligation which is extinguished when he gets it, and (2) the obligation to restore the thing which arises upon the delivery to him. (B.-L. et Barde, I, n. 23; Aubry et Rau, 5th ed. 4, p. 467; Planiol, 2, n. 996, note 1.)

Practical importance of distinction between real and consensual contracts.

There are practical consequences resulting from the theory that these contracts are *real* in the modern law.

If a debtor has promised to pledge articles as security for a debt, the creditor's real right of security does not arise until he has got the actual possession. (B.-L. et de Loynes, *Du Nantissement, des Privilèges et Hypothèques*, I, n. 6; Aubry et Rau, 4th ed. 4, p. 699; D. N. C. C. art. 2071, n. 69.)

Until that time, therefore, these articles are liable to be seized by other creditors. And in the loan for consumption of a determinate thing such as a particular cask of oil, it is the delivery which makes the borrower the owner, and if after the promise to lend, but before delivery, the thing were to perish by a fortuitous event, there would be no obligation on the borrower to return its value. (Sec B.-L. et Barde, I, n. 23; Planiol, 2, n. 996.)

CHAPTER V.

UNLAWFUL CONTRACTS.

THE Egyptian Codes say: *an obligation exists only if it has a definite and lawful cause, and the object of an obligation must under pain of nullity be the doing of something lawful and possible, and, in the case of an obligation to transfer a thing, such thing must be an object of commerce; it must be determinate at least as to its kind, and its quality must admit of being determined according to the circumstances.* (C. C. E. 94, 95/148, 149.) In all the cases in which an obligation has an unlawful cause this can only be because it binds the party to the doing of something which is unlawful. It is therefore unnecessary to say that an obligation must have both a lawful cause and a lawful object. It would have been quite enough to say that it must have a lawful object. The legislator might have omitted altogether the requirement of cause, as the German and the Swiss Codes have done. The French Code does not confuse the cause and the object to the same extent, because under its terms the object is not always an act; it may be a thing. In the *obligation de donner* the object is a thing. If I sell you a horse the object of the sale is the horse. And, accordingly, the French Code does not say that the object of a contract must be lawful. It merely says that it must be certain and be an object of commerce. For, obviously, a horse cannot be either lawful or unlawful. (C. C. F. 1126-1129.) Under the French Code it is only when the object of the contract is to do or not to do something that we can say the object is lawful or unlawful. (See *Pand. Franç. Oblig.* n. 7666.)

The Egyptian legislator, logically enough, insists that the obligation to give is merely a variety of the obligation to do. If I sell you my horse I bind myself to deliver it, that is, to do something. The object, therefore, of every obligation is the doing of something. (*Supra*, p. 64.) But, having taken up this position, the Egyptian legislator, to be consistent, ought to have dispensed with the requirement of a lawful cause and contented

himself with saying that the object of an obligation must be an act or an abstention which was lawful. From the practical point of view it is immaterial whether we say that an obligation is unlawful because its cause is unlawful or because its object is unlawful. What is important is to know what contracts are considered by the law to be unlawful.

It is not only when a contract is challenged as a whole that this question arises. It arises also when some particular clause is challenged in a contract which is otherwise lawful. For example, a contract of carriage may contain a stipulation that the carrier shall not be liable for the loss of the goods even though it was caused by the fault of his servants. Is such a stipulation against public order? And similarly when a legacy is left subject to a condition that the legatee shall do or not do something the question may arise if such a condition can lawfully be made. If the legatee could not have bound himself by contract to do or not to do this particular thing then the condition will be void.

What contracts are unlawful.

The Egyptian Codes do not attempt to explain when the cause of an obligation is considered unlawful. The French Code says: *la cause est illicite, quand elle est prohibée par la loi, quand elle est contraire aux bonnes mœurs ou à l'ordre public.* (C. C. F. 1133.) The Egyptian legislator apparently thought that this definition did not elucidate the matter, but he obviously intends to make no change in the law. When a contract is forbidden by law or is contrary to good morals or to public policy it has an unlawful cause, or, as I should prefer to say, an unlawful object. It is easy to identify the contracts which are expressly forbidden by the law. But it is more difficult to say when a contract is contrary to good morals or to public policy. We must not make the mistake of supposing that a court can declare a contract void because it appears to be unjust or exorbitant. Such contracts are no doubt in a certain sense contrary to good morals and public policy, but it would be very dangerous if any contract could be declared void merely because a judge did not approve of it.

It was said by a famous English judge, Sir George Jessel, "It must not be forgotten that you are not to extend arbitrarily these rules which say that a given contract is void as being against public policy, because if there is one thing which more

than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by courts of justice. Therefore, you have this public policy to consider that you are not lightly to interfere with this freedom of contract." (*Printing and Numerical Registering Co. v. Sampson*, 1875, L. R. 19 Ex. 462, 44 L. J. Ch. 705. Cf. per Lord Atkinson, in *Herbert Morris Ltd. v. Saxelby*, 1916, 2 A. C. at p. 699, 85 L. J. Ch. at p. 216.) And this is as true in the French law as in the English. The courts do not exist to supervise and regulate the bargains of private citizens unless these citizens belong to one of the specially protected classes, such as minors or lunatics. If other people make foolish contracts this is their affair. (Civ. 19 mars 1913, D. 1916. 1. 238. *Infra*, p. 363.)

It has been indeed suggested that by this time all the classes of contracts which the law will consider as against public policy have been discovered, and that unless a case presented to the courts is one of the familiar varieties the court has no right to declare it to be contrary to public policy. Certain classes of contracts, such as those to commit a crime, to interfere with the freedom of trade, and so forth, are recognised as unlawful, but it is too late now for the courts to invent new heads of public policy. (See per Halsbury, L.C., in *Janson v. Driefontein Consol. Mines*, 1902, A. C. at p. 491, 71 L. J. K. B. at p. 861.) Lord Halsbury says: "I deny that any court can invent a new head of public policy." As an American writer puts this view: "Public policy is not now treated as a safe or a trustworthy guide for legal decision beyond the old established limits." (Parsons on *Contracts*, 9th ed. p. 909.) But Sir Frederick Pollock, while stating that the general tendency of modern ideas is no doubt against the continuance of a jurisdiction to hold contracts void, simply because in the opinion of the court they are against the public interest, although the grounds of the judgment may be novel, goes on to say: "On the other hand there is a good deal of modern and even recent authority which makes it difficult to deny its continued existence." (Pollock, *Contracts*, 8th ed. p. 328.) The chapter is not closed, and from time to time new instances occur of contracts not easy to classify which are avoided as against public policy. The law if it is to be alive must be able to deal with new facts. (See *Wilson v. Carnley*,

1908, 1 K. B. 729, 77 L. J. K. B. 594; *Naylor, Benzon & Co. v. Krainische Industrie-Gesellschaft*, 1918, 1 K. B. 331, 87 L. J. K. B. 1066.)

It is certainly not true in the French law that the courts have no power to declare a contract void, unless it falls under one of the familiar heads of unlawful contracts. But the courts which have this power are bound to exercise it with the greatest possible discretion and to avoid interfering with freedom of contract unless this appears to be indispensable in the public interest.

It is remarkable how closely the English and the French law agree in regard to the contracts which are to be considered unlawful. The courts in the two countries have arrived quite independently at the same conclusion in regard to very many of these contracts. On this account the English cases afford useful illustrations of principles accepted in the French law, and it will be convenient to give some references to them for purposes of comparison.

Classes of unlawful contracts.

The three broadest classes into which unlawful contracts may be divided are these:—

(1) Agreements to do something which is positively forbidden by law, such as to commit a crime or to break a statute.

(2) Agreements to do something not expressly forbidden by law but contrary to morality.

(3) Agreements to do something not forbidden by law or immoral but still contrary to public policy.

The French expression *bonnes mœurs*, as used in C. C. F. 1133, is wider than the term “morality,” which as used in the English cases means practically sexual morality. (Pollock, *Contracts*, 8th ed. p. 316.) And when we consider class (3), the agreements contrary to public policy—*contraires à l'ordre public*—it is clear that this term does not explain itself.

Derogation from laws of public order.

The French Code contains an article: *on ne peut déroger, par des conventions particulières, aux lois qui intéressent l'ordre public et les bonnes mœurs*. (C. C. F. 6.) The same rule is expressed more clearly and simply in the Civil Code of Quebec, thus:—*No one can by private agreement validly contravene the laws of public order and good morals*. (C. C. Q. 13.)

In Egypt the *Decree of Reorganisation of the Native Courts* contains a provision to the same effect (art. 28). It is unlawful to contravene a law of public order. But the legislature which enacts a law does not as a rule declare whether it is to be considered a law of public order or not. The courts have to determine this from the character of the law itself. In many cases it is clear enough. Constitutional, administrative or criminal laws, laws concerning status, or limiting the capacity of persons, are familiar examples of laws which cannot be modified by the agreement of parties. (Aubry et Rau, 5th ed. 1, p. 178; D. N. C. C. art. 6, n. 16. See Aix, 8 déc. 1896, *sous Civ.* 24 janv. 1899, D. 1900. 1. 533.)

On the other hand, a person possessing the capacity to contract and to alienate may renounce a right which he enjoys by the law if this right is given to him in his private interest merely. (Aubry et Rau, 5th ed. 4, p. 331.)

So, for instance, if a man has acquired the right to plead the defence of prescription he may, if he chooses, renounce it; it is not a matter of public interest that he should take the plea. So also the law gives to an owner of immovables certain legal rights generally called servitudes, though this designation for them is not very correct, such as the right to prevent his neighbour from having a direct view over his land at a less distance than one metre. (C. C. E. 39/61. See Aubry et Rau, 5th ed. 2, p. 303.) But there is nothing to prevent an owner from renouncing his right to object to this. (Aubry et Rau, 5th ed. 3, p. 181; De Hults, *Rép. Servitudes*, n. 56; C. A. Alex. 15 mars 1906, B. L. J. XVIII, 154.) But it is otherwise if the servitude is one of those which are imposed for the benefit of the state and not for the benefit of private owners. (See C. C. E. 30/51.) When the servitude is what French writers call a *servitude légale d'utilité publique* private parties cannot alter it by contracts. So, if the law says that an owner must carry the rain water from his house on to his own land or on to the public road in such a way as to comply with the regulations for public health, this is a law of public interest. (C. C. E. 42/64.) So also is the servitude which prevents the owner of land within five cassabas (17 mètres 75 cm.) from a railway from alienating it without administrative authority. (Decree 25 juill. 1864. See De Hults, *Rép. Servitudes*, n. 95; Lamba, *Code Administratif*, p. 106.)

Laws and regulations for protecting the health and security

of the community are familiar examples of laws of public order. And they are none the less so though they may be limited to certain classes of the community, as, for instance, to the workers in some particular trade. A French *règlement* ordered employers of industry who used white lead for painting to supply their workmen with special garments for their work, and to make sure that these garments were used and were frequently washed, the washing to be done at the expense of the employers. A workman who knew the regulation supplied his own working clothes and had them washed at his own expense for four years, receiving higher wages on that account. It was held he was entitled to recover his expenses thus incurred. The parties could not derogate from the law of public order. (Cass. 30 mai 1907, D. 1908. 1. 380.)

So, a debtor cannot compromise his right to sue for repetition of money paid by way of private advantage to one creditor, or a client who has made the prohibited *pactum de quota litis* with his lawyer cannot compromise his right of challenge. In both cases the right which he has is given to him by a law of public order. (C. A. Alex. 9 mars 1898, B. L. J. X, 180; C. A. Alex. 24 déc. 1896, R. O. XXII, 96.)

In many cases it is by no means an easy matter to decide whether the law in question is or is not a law of public order. Take, for example, the important rule that obligations the value of which is above 100 P.T., subject to certain exceptions, cannot be proved by witnesses. Is this a law of public order or not? If it is, the court ought not to allow the evidence of witnesses to be received, even though the party entitled to take the objection should not do so. (D. N. C. C. art. 1341, nos. 194 *seq.*) This question will be referred to later, and is mentioned here merely as an illustration of the fact that there may be great differences of opinion as to whether a law is of public interest or not. We can do something to elucidate the matter by examples, but it is not possible to find any sharp criterion for distinguishing laws of public interest from other laws.

What contracts are against public order?

Speaking roughly, we may say that when an agreement is void as against public order this is either because it tends to injure the state directly or because it tends to deprive an individual citizen of some right or freedom of action which is given him

by the law upon some ground of public interest. If the right is of this kind it is not to be taken from him even by his own consent. To diminish his freedom is to injure the state indirectly. Most of the contracts which are considered to be against public policy will fall under one or other of the following heads:—

(1) Contracts which interfere with good government, with the administration of justice, or with the proper discharge of official duties, or which tend to weaken the state in carrying on a war.

(2) Contracts which contemplate the breach of duty as a citizen.

(3) Contracts which interfere with duties arising from the family law.

(4) Contracts which interfere with certain kinds of freedom, especially (a) freedom of marriage; (b) freedom of willing; (c) freedom of occupation, trade and competition.

(5) Certain stipulations limiting one's liability for fault.

(6) Agreements made by a *concessionaire* of the right to construct or to operate some service of public utility by which he undertakes to refrain from exercising the powers given. But, in fact, no classification of unlawful contracts can be more than a rough approximation. Room must be left for judicial discretion. And we must, therefore, have a head,

(7) Miscellaneous, in which to put cases not easily brought under any one of the familiar heads.

The examples of the three broad classes of unlawful contracts which will be given are merely illustrations and must not be regarded as in any way exhaustive.

Proof of illegality.

The unlawful character of an obligation may be proved by any methods of proof without distinction. (Colin et Capitant, 3, p. 632; D. N. C. C. art. 1131, nos. 139 *seq.*; art. 1388, n. 282; Req. 4 mars 1914, D. 1916. 1. 27.)

Class 1.

Agreements to do something positively forbidden by law.

It is not necessary to give many examples of this rule as its application is not attended with difficulty. If there is a law which says in so many words that a certain act is not to be done, no contract in defiance of this law can be valid. An agreement to reward a man for committing a crime cannot be valid.

- (Laurent, 16, n. 143; Larombière, art. 1133, n. 5, and n. 31.)
- 2- So, likewise, an agreement to pay interest above the legal rate is null to the extent of the excess. (See under interpretation of contracts, and under damages for breach of a pecuniary obligation.)

Agreements between private persons and public officials.

- In Egypt any person who gives or promises to a public official any benefit as a motive for his doing or forbearing to do any-
- 3- thing in his official character commits a penal offence. (N. P. C. 89; M. P. C. 95; *Draft Penal Code*, 188.) It follows that no action can be brought upon a promise to pay such a reward. And agreements to pay rewards to public officials for performing
4. acts connected with their official duties are invalid although they may be made without any concealment and may be sanctioned by custom. In a recent French case a question arose in regard to payments made by a butcher to a veterinary surgeon appointed by the public authority to inspect animals in the abattoir. The butcher agreed to pay the veterinary surgeon certain fees on condition that he examined his animals at particular times. It appeared that this was in accordance with custom, but it was held that the agreement was unlawful. It amounted à *faire salarier un fonctionnaire chargé d'un contrôle public par la personne même qui doit être contrôlée*. (Cass. 5 déc. 1911, D. 1913. 1. 120.) Contracts by which bribes are offered to third persons to induce them to influence officials will be dealt with later.

Carrying on unlawful business.

- 5 A contract of partnership is unlawful if it is to conduct a gaming-house, or an unauthorised lottery. (See M. P. C. 316, 317; N. P. C. 307, 308; *Draft Penal Code*, 272, 273; *Loi du 9 janv.* 1904, s. 18; *Décret de 7 mars* 1905; Lamba, *Code Administratif*, p. 183 and p. 337; C. A. Alex. 28 mars 1878,
- 6 R. O. III, 167.) An agreement between an author and a publisher contained a clause that the author assumed the entire responsibility for all actions, civil or criminal, which third parties might bring against the publisher. This clause was held to be unlawful. It tended to induce the publisher to publish a work of a libellous nature. (Req. 25 oct. 1909, D. 1911. 1. 423.)
- 7 Other examples of the rule are a partnership to manufacture and sell an article the sale of which is prohibited. (D. *Rép.*
- 8 *Oblig.* n. 586.) Or the sale of a pharmacy to a person without

a diploma. (Req. 24 nov. 1902, D. 1903. 1. 80.) So if the law forbids a doctor or a dentist from employing an unqualified assistant an agreement to the contrary will be void, and no action will lie for the wrongous dismissal of the assistant. (Cass. 19 nov. 1895, D. 96. 1. 300; Orléans, 11 nov. 1899, S. 1900. 2. 16.)

Consent to another's committing a crime.

An agreement to allow another to commit a crime is invalid. The consent of the victim cannot legalize the act. But where boxing matches are not prohibited a contract to take part in one is not unlawful. (See Douai, 3 déc. 1912, D. 1913. 2. 198. Cf. D. *Rép. Pratique*, *vo. Duel*, n. 1.)

This subject belongs more naturally to the law of responsibility.

Private agreement by insolvent debtor giving advantage to creditor.

By the Egyptian Penal Codes it is a criminal act for a creditor to stipulate "either with the insolvent debtor or with any other persons for any private advantages on account or under the pretext of his vote in the deliberations in the insolvency proceedings," or to make "any private arrangement for his own advantage and to the prejudice of the general body of creditors." (M. P. C. 300; N. P. C. 292; *Draft Penal Code*, 432. See C. A. Alex. 10 juin 1908, B. L. J. XX, 289.) Agreements fraudulently giving a preference to an individual creditor are, unfortunately, very common, not only when there is a regular scheme of settlement, confirmed by the court—*concordat judiciaire*—but also when the debtor and his creditors have come to a voluntary agreement as to the settlement of the claims—*concordat amiable et extra-judiciaire*. (See Lyon-Caen et Renault, *Manuel de Droit Commercial*, 11th ed. n. 1170.) In either case such agreements are against public policy. The policy of the law is that creditors shall share the estate of their debtor in proportion to their claims, upon an equal footing, except in so far as some of them may have legal grounds of preference.

Such fraudulent agreements are particularly apt to occur in connection with the voluntary scheme of settlement, or *concordat amiable*. An embarrassed debtor naturally desires to come to a private agreement with his creditors and in this way to avoid the cumbrous and painful procedure of insolvency. But unless all the creditors are willing to agree to take the composition

which he offers the arrangement cannot be carried out. If one of the creditors is obstinate the *concordat amiable* is excluded. In order to overcome the opposition of such a creditor and to induce him to give his consent to the voluntary scheme of settlement, the debtor promises to pay him in full or to pay him a larger dividend than the other creditors. This is a fraud upon the other creditors, because they only agreed upon the understanding that all the other creditors were being treated equally. There is no public policy which prevents one creditor getting an advantage over the others if this is given to him openly with the consent of them all. (C. A. Alex. 19 mars 1908, B. L. J. XX, 133; C. A. Alex. 15 avril 1908, B. L. J. XX, 178.) But if it is done behind their backs it is in the highest degree against public policy. (C. A. Alex. 19 mars 1908, *ut sup.*; C. A. Alex. 2 déc. 1903, B. L. J. XVI, 21; Paris, 9 mai 1898, D. 98. 2. 490; Dall. *Code de Commerce Annoté*, art. 598, nos. 1 *seq.* and *Code Com. Ann. Supp.* art. 598, nos. 18, 661 *seq.*) The French Commercial Code says that a creditor who has obtained a fraudulent advantage must restore it to the mass. (See C. Comm. F. art. 598.) This is the best way of putting a stop to the curse of such private arrangements. (D. Rép. vo. *Faillite*, n. 1518.) The Egyptian codes are silent on this point, but the law is the same. The courts will not allow the law to be evaded by the debtor arranging not to give the creditor a written promise of advantage until after the *concordat*, nor will it listen to the plea that the debtor compromised his right to sue for repetition, for there cannot be a compromise of a claim which rests upon public order. And it is no defence to an action of repetition by the debtor that he was a party to the fraud and sues *ob turpem causam*, because the law presumes that a debtor who makes an arrangement of this kind is not a free agent but was subject to moral constraint—*violence morale*. (C. A. Alex. 9 mars 1898, B. L. J. X, 180; C. A. Alex. 19 mars 1908, B. L. J. XX, 133.) The English law takes the same view of this matter. The Court of Exchequer Chamber said, "It is true that both are *in delicto*, because the act is a fraud upon the other creditors, but it is not *par delictum*, because the one has the power to dictate, the other no alternative but to submit." (*Atkinson v. Denby*, 1861, 6 H. & N. 778, 30 L. J. Ex. 362, 123 R. R. 824.) The English law as to agreements in fraud of creditors is the same as the French. (See *ex parte Milner*, 1885, 15 Q. B. D. 605, 54 L. J. Q. B. 425; *Daughlish v. Tennant*, 1866, L. R. 2 Q. B. 49, 36

L. J. Q. B. 10; Pollock, *Contracts*, 8th ed. p. 293. Cf. in Quebec, *Coté v. La Banque de St. Hyacinthe*, 1910, R. J. Q. 38 S. C. 481.)

Class 2.

Agreements to do something not expressly prohibited by law, but contrary to morality.

Here we get upon more difficult ground because we have no text of the law to guide us. It is in many cases at any rate not difficult to say with certainty that an act is a crime or is expressly prohibited by law, but it may be difficult to decide whether an act is contrary to morality. In judging whether an act is moral or immoral the court has to decide according to the standard of morality accepted by public opinion. The rule is stated in an old decision in these terms: *Il faut considérer comme contraire aux bonnes mœurs ce qui est contraire à la morale coutumière, c'est-à-dire ce que l'opinion publique répute illicite pour tous, ou même pour telle ou telle classe de personnes.* (Turin, 30 mai 1811, D. N. C. C. art. 6, n. 76. Cf. Beudant, *Explication du titre préliminaire*, n. 125. See, however, Laurent, 1, n. 56.) No doubt the standard varies from age to age and is not always the same in one country as in another. The court will not refuse effect to a contract on the ground that it is contrary to morality unless it is fully satisfied of its injurious character. Many of the kinds of contracts which are considered immoral have been so considered for generations. On the whole, what is remarkable is the unanimity with which the courts of different countries, applying different systems of law, agree to treat certain contracts as immoral. In the light of the jurisprudence the expression "contrary to morality" is by no means so vague as it might at first sight appear. It is not of course denied that difficult and doubtful cases may and do present themselves.

The broad rule is that a contract to do something immoral or to facilitate immorality is unlawful.

Under this head will fall promises of money made by a man to a woman to induce her to commence or to continue illicit relations with him. (B.-L. et Barde, 1, n. 310; Fuzier-Herman, *Rép. Gén. vo. Concubinage*, nos. 60 seq.; D. *Supp. vo. Oblig.* 182; Req. 4 janv. 1897, D. 97. 1. 126; Req. 4 mars 1914, D. 1916. 1. 27; Req. 25 juin 1887, D. 89. 1. 35; C. A. Alex. 15 mai 1907, B. L. J. XIX, 260.)

But it is promises the purpose of which is to induce immorality

which are unlawful. There is no immorality in the promise to make provision for the concubine when the illicit cohabitation has terminated. If the intention is to make compensation to the woman for loss which has been caused to her by the relationship this is considered by the French jurisprudence as the fulfilment of a natural obligation. (Rennes, 7 mars 1904, D. 1905. 2. 305; D. *Supp.* vo. *Oblig.* n. 183; D. N. C. C. art. 1133, n. 467; D. N. C. C. Additions, art. 902, nos. 48 *seq.* *Supra*, p. 34.)

In these cases much will depend upon the circumstances, such as the character of the woman before the relationship began, the period during which the concubinage has lasted, the age and position of the parties at its termination, and the like. If when the relationship terminates the woman is of an age at which it would be difficult for her to earn her own living, a promise by the man to pay her an annuity for life may be a reasonable provision. (Rennes, 7 mars 1904, *ut sup.* and *Dissertation* by M. Planiol.) If, in all the circumstances of the case, the sum promised appears to be excessive, there is power to reduce it to a reasonable amount, and a reasonable amount will mean such a sum as may be considered to be payment of the natural obligation. (Caen, 10 juill. 1854, D. 55. 2. 162; *Pand. Franç.* vo. *Oblig.* n. 7711.)

These principles have been accepted by the Native Court of Appeal in Egypt. (C. A. 13 juin 1909, O. B. XI, n. 3.) In order, however, that such obligations should be valid it must appear that they were intended to make compensation for the wrong done. A promise of money to a mistress on the termination of the liaison is not valid if it was made to procure her silence. (Aix, 25 janv. 1883, D. 83. 2. 237.) In the English law also past cohabitation is not an unlawful consideration, though by the technicality of the English law such a promise cannot be enforced unless made under seal. (*Beaumont v. Reeve*, 1846, 8 Q. B. 483, 15 L. J. K. B. 141, 70 R. R. 552. See Pollock, *Contracts*, 8th ed. p. 318.)

Other immoral contracts are the lease of a house of prostitution or the assignment of such a lease. (Alger, 15 nov. 1893, D. 94. 2. 528; Paris, 14 déc. 1899, D. 90. 2. 189; B.-L. et Bardé, 1, n. 310. Cf. in Quebec, *Provident Trust and Investment Co. Ltd. v. Chapleau*, 1903, R. J. Q. 12 K. B. 451; and in England, *Smith v. White*, 1866, L. R. 1 Eq. 626, 35 L. J. Ch. 454.) In an English case it has been held that a landlord who lets a

~~flat~~ to a woman knowing she is a kept mistress and that the rent will be paid indirectly by the man who keeps her has no action for the rent. (*Upfill v. Wright*, 1911, 1 K. B. 506, 80 L. J. K. B. 254.) When the immediate purpose of the contract is not to bind either of the parties to perform an immoral act, but the intention of both parties is, nevertheless, unlawful, the question is much more difficult. A loan, for example, made to enable the borrower to buy a house of prostitution does not bind the borrower to apply the money in this way. The question when contracts are void as facilitating immorality, although they do not bind the parties to perform immoral acts, has been considered earlier in discussing the theory of cause. (*Supra*, pp. 60 seq.)

An English case is a good illustration of the principle that the courts are entitled to avoid any contract which has a tendency to induce immorality. A married man made a promise to a woman who knew he had a wife living that he would marry her when his wife died. It was held such a promise was void and no action of damages could be brought for breach of the promise. (*Wilson v. Carnley*, 1908, 1 K. B. 729, 77 L. J. K. B. 594, C. A.)

Stipulations of reward for abstaining from unlawful or immoral acts.

It is contrary to morality to allow a man to sue for a reward which has been promised to him on condition that he shall abstain from unlawful or immoral conduct. If he has promised not to commit a crime or that he will give up an adulterous intercourse he cannot claim to be rewarded for this, though a reward may have been promised to him.

This was the solution of the Roman law, and the French law has followed it. (Larombière, art. 1133, n. 7; Pothier, *Oblig.* n. 204; D. N. C. C. art. 1133, n. 509.)

A man has no right to use his vices as a fund of credit or as a means of extorting money. *Si ob maleficium ne fiat promissum sit, nulla est obligatio.* (Dig. 2. 14. De Pactis, 7. 3.) In the Roman law, if money had been paid to induce a person to abstain from sacrilege, or theft, or murder, or other criminal or immoral conduct, it might be recovered by the *condictio ob turpem causam*. (Dig. 12. 5. 7.)

Stipulation of reward for doing one's legal duty.

Similarly it is immoral to allow effect to promises of reward made to induce a man to perform his legal duty. (Girard, 5th ed. p. 522; B.-L. et Barde, 1, n. 310; D. N. C. C. art. 1133, n. 509.) The thief or the accomplice of the thief cannot recover on the promise made to him for the restoration of the stolen goods, and if he has been paid for so doing he can be compelled to return the money. (Code 4. 7. 6. and 7, *De Cond. ob turp. causam*; Larombière, art. 1133, n. 12.) If an innocent third party discovers the whereabouts of the stolen goods, and offers to give the owner this information for a reward, there is nothing unlawful in this, for he has no legal duty to give the information. (D. Rep. Oblig. n. 640.) But when the legal duty exists it must be done without reward, or, at any rate, no action lies on the promise to pay a reward. So if the depositary stipulates a price for the return of the deposit, or the borrower for returning the thing lent, he cannot sue upon it. (Same authorities.)

Stipulations of reward for bringing about a marriage.

Is it contrary to morality to allow a man to stipulate for a reward on condition that he brings about a marriage? In the French law this question is still highly controversial. Matrimonial agents—*courtiers matrimoniaux*—make a regular business of bringing about marriages, and it is a common term of agreements made with them by a man seeking a wife that in the event of success he shall pay the matrimonial agent a certain fixed sum or a proportion of the dowry brought by the wife, and that, otherwise, nothing shall be paid for the *courtier's* services. When an agreement is of this kind there is much authority for considering it immoral. (Larombière, art. 1133, n. 11; Demolombe, 24, n. 335; Aubry et Rau, 5th ed. 4, p. 553; Cass. 1er mai 1855, D. 55. 1. 147; Caen, 23 févr. 1904, S. 1905. 2. 263.) The reasons for this opinion are very strong. The marriage broker, who is to get nothing unless he succeeds, is not likely to be scrupulous in the means which he employs. It is very important that matrimonial consent should be free and unbiassed by the influence of outsiders whose interest is mercenary. The courts will regard with great suspicion contracts which tend to prevent this freedom of matrimonial consent. The object of the agent is to bring the marriage about at all hazards, and he will be strongly tempted to make false statements, or to conceal facts

and to persuade the parties and their friends to overlook objections to the marriage which may be serious enough. These reasons are stated by the Cour de Cassation:

Le mariage, étant, dans le système de notre législation, un engagement irrévocable qui touche aux intérêts les plus élevés de la famille et de la société, dont il est la base essentielle, le consentement des époux qui s'unissent ou des parents qui ont autorité sur eux, doit être libre, éclairé, et, par conséquent, affranchi de toute influence étrangère et intéressée à agir sur la détermination des uns ou des autres . . . tout ce qui serait de nature à compromettre ou à altérer la moralité et la liberté du consentement est par cela même contraire au vœu de la loi, à l'ordre public et aux bonnes mœurs . . . il en est ainsi d'une convention par laquelle un tiers, s'engageant à employer ses soins et ses démarches pour un mariage, stipule en retour, sous la condition de réussir, une prime calculée moins en raison des soins et des démarches promis qu'en vue du succès et selon l'importance du résultat. . . . Aux relations destinées à préparer l'indissoluble société dans laquelle chacun des époux apporte, avec ses biens, sa personne même et sa vie tout entière, un pacte de cette nature mêlerait l'intervention et l'intérêt d'un agent dominé par des idées de spéculation et de trafic. . . . Pour assurer le succès qui est la condition de la prime stipulée, cet agent pourrait, même sans fraude, peser directement ou indirectement sur le consentement des époux ou de leurs parents, en agissant de façon à dissimuler ou à prévenir, à atténuer ou à combattre les causes même les plus légitimes d'hésitation ou de refus. (Cass. 1er mai 1855, ut supra.)

The Court of Cassation takes up a middle position between two extreme views on the subject. According to it there is nothing illegal in the contract itself if the reward is a mere remuneration for services rendered, whether successful or not, and not a sort of prize to be gained by the agent only if he succeeds. If this view is correct, it follows logically that the agent will be, at any rate, entitled to an indemnity for his expenses, though he cannot claim a commission. (Cass. 20 avr. 1904, D. 1904. 1. 420, S. 1905. 1. 281. See Trib. Civ. Seine, 3 juin 1912, D. 1913. 5. 21.) Even when there has been no contract for remuneration a claim for indemnity would lie on the quasi-contract. (Nîmes, 18 mars 1884, D. *Supp. Oblig.* n. 180; D. N. C. C. art. 1133, n. 330. See, *infra*, in the Chapter on the *Actio de in rem verso*.)

This theory has been criticised from two points of view :—

(1) It is contended on the one hand that any agreement to pay money for bringing about a marriage has an unlawful cause. It is immaterial whether the agent stipulates for a certain percentage of the dowry or a fixed sum or for a reasonable commission for his services. The services themselves being unlawful, no action can lie for their remuneration. (Toulouse, 5 nov. 1900, sous Civ. 20 avr. 1904, D. 1904. 1. 420, S. 1905. 1. 281; Laurent, 16, n. 151.) This appears to me to be the sound view.

(2) On the other hand many French authorities contend that agreements with matrimonial agents are in principle perfectly valid. What can be more lawful or more in the public interest than to facilitate marriage?

The *entremetteur* is after all an agent whose services are directed to an end which the law specially favours. Why therefore should he not be entitled to remuneration? It may be that the remuneration agreed upon is excessive, but if so there is power to reduce it, for, according to the French jurisprudence, the remuneration promised to an agent of any kind can be reduced if it appears to the court to be exaggerated. (Cass. 27 janv. 1908, D. 1908. 1. 155; Planiol, 2, n. 2236.) And in Egypt this power is given by the Code. (C. C. E. 514/628.) If the matrimonial agent has induced his client to contract with him by fraud, or if he has caused damage to his client by giving him false information or otherwise, the ordinary legal remedies are available. This theory that there is nothing illegal in principle in the contract with the matrimonial agent has the support of many eminent authorities. (*Consultation de* MM. Delangle, Berryer, etc., D. 53. 2. 211; *Dissertation par* M. Planiol, D. 1908. 2. 81; Wahl, *Le Courtage Matrimonial*, in Rev. Trim. 1904, p. 471; B.-L. et Barde, 1, n. 311.) And there is some jurisprudence in its favour. (Trib. de Lisieux, 21 janv. 1903, D. 1908. 2. 81; Agen, 13 déc. 1909, S. 1910. 2. 211.) The arguments of its partisans are more specious than sound. The law favours marriage, but it does not favour people being tricked into undesirable marriages. Contracts in which a disproportionate reward is promised for success are apt to lead to this result. It is idle to say that the party will have his remedy against the agent. Such pecuniary compensation as he might obtain in this way could not indemnify him against the prejudice

he had suffered by being led into a marriage with an unsuitable consort.

In a recent Egyptian case a marriage had been brought about by the offices of an intermediary, belonging to the class of persons called *khatba*, who make it a business to act in this way. This woman brought an action against the husband and wife for L. E. 25 as a remuneration for her services. The court rejected the claim on the ground that it was contrary to good morals and public order, and stated very clearly the reasons for this view. "Marriage which is essentially a contract of which the object is the foundation of a family and must for that reason be based on purely moral considerations, affects personal status, and must not therefore be the subject of the interested calculations of a person who intervenes in order to bring it about."

The court pointed out that such contracts are even more dangerous in Egypt than in France, owing to the fact that in Egypt, among Mohammedans, the young man and the young woman have no opportunity of making the acquaintance of each other. This makes it easier for the intermediary to deceive each of them with regard to the qualities of the other. (Summ. Trib. Abdine, 17 March, 1915, O. B. XVI, n. 56.)

But the employment of a friend of the families concerned to act as a go-between is considered by many Mohammedan authorities as quite lawful.

Comparative law.

(a) *Roman law*.—In the Roman law contracts with a marriage agent were valid, but by a late constitution the remuneration was limited. (C. 5. 1. 6.) Where no reward was stipulated the court had power to give a moderate reward, but the business was characterised as a sordid one. *De proxenetico quod et sordidum, solent praesides cognoscere*. (D. 50. 14. 3.)

(b) *Italy and Roumania*.—The jurisprudence in these countries holds such contracts to be valid. (Bologna, 18 avr. 1904, S. 1905. 4. 5; Cass. Roumanie, 19 janv. 1899, S. 1901. 4. 37.)

(c) *Belgium*.—In Belgium the jurisprudence has varied, but it seems now to be in favour of the theory of the *Cour de Cassation*. (Cass. de Belgique, 16 mars 1905, *Pasicrisie Belge*, 1905. 1. 156.)

(d) *England*.—In England all such agreements, called marriage brokerage agreements, are void. (*Cole v. Gibson*, 1750, 1 Ves. Sen. 503; *Hermann v. Charlesworth*, 1905, 2 K. B. 123, 74

L. J. K. B. 620; Pollock, *Contracts*, 8th ed. p. 366; Leake, *Contracts*, 6th ed. p. 554.)

(e) *Germany*.—In Germany before the code the question had been highly controversial. The prevailing view appears to have been that the stipulation of a reward for bringing about a marriage was not in itself immoral. If the agent used means to deceive the parties or to interfere with their freedom of choice he could not recover. (See Saleilles, *Déclaration de Volonté*, p. 277.) The German Code ended the dispute by an article providing that the promise to pay a remuneration to a marriage agent is not actionable, but that if the reward has been paid it cannot be recovered (art. 656). The German legislator applies to this contract the same rule as to gaming contracts. Neither contract is immoral, but neither is actionable. If, however, the debtor chooses to pay, the performance is not considered an *indebitum*. (See Schuster, *German Civil Law*, p. 138.)

Revealer of a right of succession.

Another question which has led to great division of opinion in France is with regard to contracts made with the persons called *révélateurs de successions* or *chercheurs de successions*. These are people who make it a business to search out heirs of a deceased person and inform them of their rights. They also undertake to help persons who are in doubt as to their relationship to others by investigating family histories and pedigrees. It is not uncommon for the succession-searcher to stipulate that in the event of his establishing the client's claim to a certain succession he shall receive as his remuneration a share of the succession or a sum fixed beforehand. Is such a contract contrary to morality? According to some authorities the agent cannot claim anything unless it would have been impossible, or at any rate very difficult, for the heir to have discovered his rights without the assistance of the succession-searcher. (B.-L. et Wahl, *Louage*, 2nd ed. 2, n. 3145; Bordeaux, 18 juill. 1898, D. 99. 2. 95; D. N. C. C. art. 1999, n. 259.)

△ If he reveals or discovers nothing but what is common knowledge or could have been discovered by anybody with a little trouble he has not rendered the services which he undertook. (See Paris, 28 juill. 1879, *Dall. Supp.* vo. *Agent d'affaires*, n. 6.) But when he has really discovered something the claim which he makes for his remuneration under the contract does not rest upon

any unlawful cause. (Liège, 12 juill. 1893, D. 94. 2. 381; Trib. Civ. de Saumur, 31 juill. 1915, D. 1917. 2. 75.) In this case, as in the case of the marriage-agent, the remuneration promised may be reduced. (Trib. Civ. Nantes, 13 juin 1898, Gaz. Pal. 98. 2. 102.) This last point is controversial. According to one theory the succession-searcher must not be considered as a mere agent. He undertakes difficult and skilled work for the performance of which he is specially equipped, and the contract which he makes with the client is an aleatory contract. The searcher's time and trouble may be thrown away, and if he stipulates for a share of the succession if his efforts are fruitful, there is no reason why the court should interfere with a conclusion freely arrived at by the parties. (Cass. 7 mai 1866, D. 66. 1. 247; Paris, 12 mars 1894, D. 94. 2. 484; B.-L. et Barde, 1, n. 312; D. N. C. C. art. 1999, n. 252.) There is much to be said for this view, but the courts will regard such contracts with considerable jealousy. The clients as a rule are ignorant and inexperienced, and the courts will seek to prevent such contracts from being made engines of extortion.

There does not seem to be any Egyptian jurisprudence upon this point, and, probably, there are no professional revealers of successions in Egypt. But in one case a sum had been promised to a man for carrying out an investigation as to the legal rights of certain persons to occupy lands which they were said to be usurping. The contention that the cause was unlawful was rejected by the Mixed Court of Appeal though the reward was promised to the *chercheur* only in the event of his success. (C. A. Alex. 28 déc. 1889, B. L. J. II, 354.)

Contrat de claque.

IN France persons who call themselves *entrepreneurs de succès dramatiques* make agreements with the managers of theatres to ensure the success of a performance by supplying a *claque* to applaud. There is a considerable jurisprudence in France to the effect that such agreements are contrary to public order and good morals. And this view is supported by some of the writers. (Cass. 17 mai 1841, S. 1841. 1. 623; Lyon, 23 mars 1873, D. 73. 2. 68; Aubry et Rau, 5th ed. 4, p. 544; Demolombe, 24, n. 334.) The immorality is said to consist in money being promised for applause which is not based upon genuine appreciation. The venal applause of the *claque* disturbs the æsthetic judgment of

the spectators. This seems to carry the theory of unlawful contracts to fantastic lengths, and in a more recent case the Court of Paris has held that the *contrat de claque* is not illegal. (Paris, 5 avr. 1900, D. 1903. 2. 279.)

The court said that such a contract causes no disorder, is approved of by the dramatic authors, and the applause given at the expected time helps the actors to conquer their emotion and gives them a rest at critical moments. Whether these reasons are good or not, it is difficult to say why such a contract freely entered into can be considered immoral. The courts are not charged with the duty of protecting the artistic judgment of the spectators in a theatre against undue influence. Contracts of this kind will naturally be regarded with suspicion, for it may be well understood by the theatre manager that if the *entrepreneurs* are not engaged to applaud they will make hostile demonstrations against the piece. If the contract with them is induced by this kind of blackmail it can be set aside. But if this element is not present there is no illegality in it.

Agreements contrary to public order.

These may be subdivided under the heads previously indicated:—

(a) *Contracts which interfere with good government, with the administration of justice, or with the proper discharge of official duties, or which weaken the state in carrying on a war.*

(1) External relations.

A contract may interfere with good government either as affecting the state in its external relations or in its internal relations. A simple illustration of a contract which would be void as affecting external relations would be a contract to help a foreign state which was at war with our own by giving it information or otherwise. Such a contract would be an act of treason prohibited by the penal law. But contracts affecting the state in its foreign relations may be void as against public order, although they are not treasonable.

Contracts which weaken the state in carrying on a war.

Trading with the enemy.

The most important class of contracts which are void because detrimental to the state in its foreign relations are contracts which

involve trading with an enemy. In England and in America, as will be explained later, the principle is quite settled that trading with the inhabitants of the enemy's country is against public policy at common law. In France there has been some controversy on the question whether without special legislation trading with the persons residing in an enemy country is unlawful. The older writers accepted the view which as we shall see prevails in England that such trading is unlawful upon general grounds. But in some recent wars, and notably in the Crimean war, the belligerents agreed to allow their citizens to trade with each other subject to certain restrictions. And some modern French authorities refuse to admit that there is any general principle of law which prohibits such trading. (Calvo, *Droit International*, 3, n. 1686.) Some authorities say that trading in general is permitted: the only trading which is illegal is trading in articles which are contraband of war, or such trading as is prohibited by some special law. But the tendency is in favour of the other view, viz., that the interdiction is the rule, and that all trading is illegal except with special permission. *La déclaration de guerre a pour conséquence d'entraîner l'interdiction de commerce entre les nations belligérentes*. (Lyon-Caen et Renault, *Traité de Droit Commercial*, 1, n. 209, *sub. fin.*) It is submitted that this is the right conclusion. Such trading is against public policy upon the clearest grounds:—

(1) It helps the enemy by supplying him with money, goods, or credit which he needs. The suspension of trade paralyses and demoralises him.

(2) An enemy may be able to make use of commercial intercourse with citizens of the other state in order to acquire information as to public feeling, the condition of business and so forth, all which may be useful to his country.

(3) There is an irreconcilable inconsistency in two merchants dealing with each other upon friendly terms when their respective countries are at war. The enemy of my country ought to be mine. (See *Pand. Franç.* vo. *Guerre*, *Droit de la*, n. 88.)

English law.

The rule is thus stated in an English case: "It is now fully established that, the presumed object of war being as much to cripple the enemy's commerce as to capture his property, a declaration of war imports a prohibition of commercial intercourse and

correspondence with the inhabitants of the enemy's country, and that such intercourse except with the licence of the crown is illegal." (*Esposito v. Bowden*, 1857, 7 E. & B. 763, 779, 27 L. J. Q. B. 17, 110 R. R. 822.) Or as it has been expressed in a later case, "The declaration of war amounts to an order to every subject of the Crown to conduct himself in such a way as he is bound to conduct himself in a state of war. It is an order to every militant subject to fight as he shall be directed, and an order to every civilian subject to cease to trade with the enemy" (per Lord Wrenbury in *British and Foreign Marine Ins. Co. Ltd. v. Sanday & Co.*, 1916, 1 A. C. 650, 85 L. J. K. B. at p. 562). War dissolves all contracts which involve trading with the enemy. So a contract of agency between a foreign company and a British company resident in their respective countries constituting the latter company the agents of the former for the sale of their machines is terminated by the outbreak of war between the two countries. (*Stevenson & Sons v. Aktiengesellschaft für Cartonnagen Industrie*, 1917, 1 K. B. 842, 86 L. J. K. B. 516.)

In an American case, the principle is thus stated: "The law of nations, as judicially declared, prohibits all intercourse between citizens of the two belligerents which is inconsistent with the state of war between their countries; and this includes any act of voluntary submission to the enemy, or receiving his protection, as well as any act or contract which tends to increase his resources, and every kind of trading or commercial dealings or intercourse, whether by transmission of money or goods or orders for the delivery of either, between the two countries, whether directly or indirectly, or through the intervention of third persons or partnerships, or by insurances upon trade with or by the enemy." (*Kershaw v. Kelsey*, 100 Mass. 561, cited by American editor to Pollock, *Contracts*, 3rd Amer. ed. p. 427, where see other American cases.)

Meaning of "alien enemy" in English law.

But when the English law forbids "trading with the enemy" the term "enemy" has a very special sense. An "alien enemy," for this purpose, does not mean a person of enemy nationality but a person who has what has been styled a "commercial domicile" in the enemy territory. (See *Naylor, Benzon & Co. v. Krainische Industrie Gesellschaft*, 1918, 1 K. B. 331, 87 L. J.

K. B. 1066; and cases there cited.) The criterion is not whether the person is a subject of an enemy state but where does he reside and carry on business. A person who voluntarily resides in and carries on business in an enemy's country is an "alien enemy" though he may be a British subject or the subject of a neutral state. (*Porter v. Freudenberg*, 1915, 1 K. B. 857, 84 L. J. K. B. 1001.) Conversely, the subject of an enemy state residing and carrying on business in England is not an "alien enemy" for purposes of contract. (*Schaffenius v. Goldberg*, 1916, 1 K. B. 184, 85 L. J. K. B. 374.)

The French law, as we shall see, is to a similar effect.

Statutory powers in England to avoid contracts.

By a recent amendment to the law, the Board of Trade may by order cancel a contract made with an enemy or enemy subject before or during the war if it appears to the Board that such contract is injurious to the public interest. The contract may be cancelled either unconditionally or upon such terms as the Board may think fit. (*Trading with the Enemy Amendment Act*, 1916 (5 & 6 Geo. 5, c. 105), s. 2.)

The rule is a rule of municipal law.

The rule which prohibits individual citizens of belligerent states from trading with one another is not in truth a rule of international law, though it is commonly discussed by writers on that subject. For public international law consists of "the rules which determine the conduct of the general body of civilised states in their dealings with each other." (Lawrence, T. J., *Handbook of Public International Law*, 8th ed. 3.)

French law as to meaning of "enemy."

And in France as in England unless there is special legislation to the contrary, it is only trading between persons residing in the two different belligerent countries which is prohibited. A subject of an enemy state, who continues to reside in the territory of the state which is at war with his own, is not prohibited from carrying on his business, provided he does not trade with his own country. He can deal with the people of the state in which he resides, or with the subjects of neutral states. (*Lyon-Caen et Renault. Traité de Droit Commercial*, 1, n. 209.)

When is a moral person an enemy.

In deciding whether a moral person such as a limited company is an enemy in the sense contemplated the ordinary tests of nationality or of residence are not applicable.

Some of the shareholders may reside in the territory of an enemy state, others in the territory of the state before whose courts the question arises, and still others may reside in neutral states.

For purposes of private law there may be adequate reasons for holding that the company is of the nationality of the country in which its head office is situated. But for purposes of public law, and, in particular, for determining if the company is an enemy, this criterion would lead to unsatisfactory conclusions.

Since the outbreak of the present war the courts of the belligerent countries have had to consider the important question whether the rules which are accepted as determining the nationality of companies for purposes of private law are equally applicable in the public law.

Both in France and in England the courts have had to examine the position of companies whose shares were mainly held by citizens of an enemy state, and to decide whether such a company was to be considered as an alien enemy. The courts of both countries have reached substantially the same conclusion that, in questions of this kind, they are entitled and bound to look into the real character of the company. If it appeared that it was in reality being carried on for the benefit of enemies, the company must be treated as an alien enemy irrespective of the facts that it was carrying on business within the jurisdiction of the court and that its apparent nationality was not that of an enemy state.

In the principal French case, the question was as to a company in which nearly all the shareholders were Germans. The manager and certain of the directors who were Germans had resigned office the day before war was declared. The *Chambre des Requêtes* held that: *Un arrêt maintient à bon droit la mise sous séquestre d'une société qui bien que fondée en France conformément à la loi française, ayant son siège social en France n'est en réalité qu'une personne interposée sous le couvert de laquelle une entreprise commerciale et industrielle allemande faisait le commerce en France.* (Req. 20 juill. 1915, D. 1916. 1. 44.)

A *circulaire* of the *Garde des Sceaux* of 29 févr. 1916, concerning the application of the law of 22 juill. 1916, which requires a declaration as to all property held by subjects of enemy powers affirms the same principle.

Il n'y a pas lieu de distinguer davantage, suivant leur nationalité, entre les sujets ennemis dont les biens, intérêts ou accords sont soumis à la déclaration. La loi est applicable à tout ressortissant de tout pays en guerre avec la France, qu'il réside ou non dans le dit pays.

Les personnes morales sont ici encore assimilées aux individus, et je ne saurais trop rappeler, à ce point de vue, qu'il ne saurait être fait état, à l'égard des sociétés, de leur nationalité d'apparence. Les formes juridiques dont la société est revêtue, le lieu de son principal établissement, tous les indices auxquels s'attache le droit privé pour déterminer la nationalité d'une société, sont inopérants, alors qu'il s'agit de fixer, au point de vue du droit public, le caractère réel de cette société.

Elle doit être assimilée aux sujets de nationalité ennemie dès que, notoirement, sa direction ou ses capitaux sont, en totalité ou en majeure partie, entre les mains de sujets ennemis car, en pareil cas, derrière la fiction du droit privé se dissimule, vivante et agissante, la personnalité ennemie. (Législation de la Guerre, 4, p. 19.)

In a very important recent case in England it was necessary to examine the same question. A limited liability company had been incorporated in England and carried on its business there. All the shares of the company except one were held by Germans resident in Germany, and the managing directors were resident there. The remaining one share was held by a man of German origin but naturalised as an Englishman, who was the secretary of the company and took part in the management of its business. He resided in England. The action was for the price of goods sold and delivered to the defendants in England before the outbreak of war between England and Germany. The defence was that the payment to the company would be payment to an enemy resident in the enemy country and was therefore forbidden by the *Trading with the Enemy Acts*. This defence raised the whole question whether it was possible for the law to look behind the fiction of moral personality. According to the fiction of moral personality the payment here would be a payment to the moral person purely and simply, and not at all to the shareholders. The moral person was an English company carrying on business in England. How could such an entity be an alien enemy? The

argument which prevailed in two courts but was finally rejected in the highest Court of Appeal may be thus summarised:—

The company was a legal person different altogether from the person of the shareholders. In the language of Lord Reading, C.J.: "It cannot be technically an English company and substantially a German company except by the use of inaccurate and misleading language. Once it is validly constituted as an English company it is an artificial creation of the legislature, and it retains its existence which cannot be swept aside as a technicality. It is not a mere name or mask or cloak or device to conceal the identity of persons and it is not suggested that the company was formed for any dishonest or fraudulent purpose. It is a legal body clothed with the form prescribed by the legislature."

The Court of first instance and the Court of Appeal, applying this theory, held that payment to the company was not payment to the shareholders of the company, or for their benefit. But in the Supreme Court of Appeal—the House of Lords—the judgment of the Court of Appeal was reversed. The House of Lords found it possible to go behind the fiction, and to take account of and be guided by the personalities of the natural persons associated together to form the company. The decision of the House of Lords was as follows:—

"A company incorporated in the United Kingdom is a legal entity which can neither be friend nor enemy, and can only act through agents properly authorised; and so long as it is carrying on business in this country through agents resident here, or in a friendly country, it is to be regarded as a friend. It may assume an enemy character, if its agents *de facto* are residents in an enemy country or are acting under the control of enemies.

The character of individual shareholders, and their conduct, may be material on the question whether the agents of the company are, in fact, acting under the control of enemies."

It was pointed out in the judgments that the moral person was a mere fiction of the law, a piece of machinery to enable certain persons to carry on business in association and to divide profits, and that the law could not allow this machinery to be used for the payment of money to the King's enemies.

"The moral person could not be an enemy, but if the moral person was under the control of enemies, it would be considered as having an enemy character."

"The artificial legal person called the corporation has no physical existence. It exists only in contemplation of law. It has neither body, parts, nor passions. It cannot wear weapons, nor serve in the wars. It can be neither loyal nor disloyal. It cannot compass treason. It can be neither friend nor enemy. Apart from its corporators, it can have neither thoughts, wishes, nor intentions, for it has no mind other than the minds of the corporators."

The moral person had no independent power of motion. It could act only through organs properly authorised. Now, here, after the outbreak of war, the only persons who could make or unmake these organs, dictate their conduct, prescribe their duties, and call them to account, were a number of Germans who had become alien enemies. After the outbreak of the war, the directors could not authorise any one to bring an action in England. Seeing that the company could not appoint any directors other than alien enemies, though the legal entity, the company, might continue to exist, its action in its trade in England was paralysed in point of law, the status of its agents as distinct from that of its shareholders, rendering it incapable of making any contract. (*Daimler Company v. Continental Tyre & Rubber Company, Ltd.*, 1916, 2 A. C. 307, 85 L. J. K. B. 1333, 84 L. J. K. B. 926, 1915, 1 K. B. 893. Cf. *Clapham Steamship Co. v. Naamlooze Vennootschap Vulcan*, 1917, 2 K. B. 639, 86 L. J. K. B. 1439. See Law Quarterly Review, 31, p. 247.)

Matter generally regulated by special laws.

Any doubts which there may be as to what kind of trading with the enemy is prohibited is generally removed by special statute or by Decrees or Administrative Orders made after the outbreak of hostilities laying down the rules on the subject.

For example, after the outbreak of war in 1914 between France and Germany the President of the French Republic issued a *Décret* in these terms:—

art. 1. — *A raison de l'état de guerre et dans l'intérêt de la défense nationale, tout commerce avec les sujets de l'empire d'Allemagne et d'Autriche-Hongrie ou les personnes y résidant, se trouve et demeure interdit.*

De même, il est défendu aux sujets desdits empires de se livrer, directement ou par personne interposée, à tout commerce sur le territoire français ou de protectorat français.

art. 2.—*Est nul et non avenu comme contraire à l'ordre public, tout acte ou contrat passé en territoire français, ou de protectorat français, par toute personne, soit en tous lieux par des Français ou protégés français, avec des sujets de l'empire d'Allemagne et d'Autriche-Hongrie ou des personnes y résidant.*

art. 3.—*Pendant le même temps, est interdite et déclarée nulle comme contraire à l'ordre public, l'exécution au profit de sujets des empires d'Allemagne, ou d'Autriche-Hongrie ou de personnes y résidant, des obligations pécuniaires ou autres, résultant de tout acte ou de contrat passé, soit en territoire français ou de protectorat français, par toute personne, soit en tous lieux par des Français ou protégés français, antérieurement aux dates fixées à l'alinéa de l'article 2.*

art. 4.—*Les dispositions des articles 2 et 3 du présent décret sont applicables même dans le cas où l'acte ou contrat aurait été passé par personne interposée.* (Fait à Bordeaux le 27 sept. 1914; *Journal Officiel de la République française*, 28 sept. 1914, p. 8069; Schaffhauser, *Lois Nouvelles*, 1914, 3me partie, p. 327.) In Egypt there have been various proclamations regulating trading with the enemy. (They are collected in the official *Recueil des Documents relatifs à la guerre.*)

And in England a number of statutes have been passed. (*Trading with the Enemy Act*, 1914 (4 & 5 Geo. 5, c. 87). Amended by 5 Geo. 5, c. 12; 5 & 6 Geo. 5, c. 79; 5 & 6 Geo. 5, c. 105, and by various Proclamations. See, on this subject, in England, Baty, T., and Morgan, J. H., *War, its Conduct and Legal Results*; Page, A., *War and Alien Enemies*, 2nd ed.; Coleman Phillipson, *Effect of War on Contracts*; Campbell, H., *The Law of War and Contract*; and in France, Schaffhauser, *Lois Nouvelles*, 1915, and subsequently; Wahl, A., in *Rev. Trim.* 1915, p. 383.)

Illustration of contract void as assisting enemy in a less direct manner.

Besides such obvious cases as treasonable offers of service to the enemy, and the well known rule forbidding trading with the enemy, there are other cases of a less familiar kind to which the same principle ought to be applied.

A recent English case is a good illustration, and it is submitted that the question would be answered in the same way in a French

court. The owners of a British ship chartered her in 1913 to a Dutch company for a term of five years. All the shares in the Dutch company were held by three German companies. The charter-party provided that in the event of war between Great Britain and any European power the charterers were to have the option of suspending their charter during the period of hostilities. They claimed to exercise this option. It was held that the charter-party was for the benefit of the enemy and that the outbreak of war made it illegal *in toto*. The charter-party was declared to be dissolved. It indirectly supported the enemy during the war because if it were suspended the British owners would be hampered in their use of the ship. If they made use of it and the ship was lost they would be liable in damages for failure to produce it at the end of the war. On the other hand, the Germans would be enabled fully to commit their own shipping for the purposes of their trade during the war without being hampered by the necessity of having it free at the end, for then they would have the right to the services of the shipping of their adversaries. (*Clapham Steamship Co. v. Naamlouze Vennootschap Vulcan*, 1917, 2 K. B. 639, 86 L. J. K. B. 1439.) If the subjects of a state which is contemplating a war make contracts with the unsuspecting subjects of the state which it is proposed to attack, and the effect of such contracts is to place this latter state at a disadvantage during the struggle, such contracts are against public policy in that state whatever they may be in the other.

(2) Internal relations.

There are many illustrations of contracts which are void as against the interest of the state in its internal relations. The constitutional law of the country, the criminal and fiscal law, are determined by considerations of general interest and no agreement between two private individuals can be allowed to infringe or modify any of these laws. So, any contract which aims at overthrowing the established government is obviously unlawful. So is a partnership to smuggle goods from a foreign country without paying duty. (Douai, 11 nov. 1907, D. 1908. 2. 15.) And so would be a contract clandestinely to introduce arms contrary to the provisions of law. (C. A. Alex. 27 janv. 1909, B. L. J. XXI, 136.) So are all contracts to bribe members of the legislature, or public officials. (Req. 5 févr. 1902, D. 1902. 1. 158; Req. 15 mars 1911, D. 1911. 1. 382; Trib. Caïre, 5 juin 1901,

O. B. III, n. 85.) So are contracts to bribe voters, whether by money or by other favours. (Trib. Civ. Tarbes, 14 mars 1899, D. 1904. 2. 201.)

Contracts to pay money to influence officials.

Promises to pay money to a man who undertakes to use his influence with public officials for the advantage of the payer are always null. Public officials are vested with discretion which is to be exercised impartially and in the public interest solely. All contracts the purpose of which is to induce officials to exercise this discretion not upon public grounds but out of favour to individuals are clearly against the public interest. The *Cour de Cassation* in a recent case affirmed this principle in holding a contract to be illicit under which money was paid to a man to use his influence to obtain a tramway concession for the payer. (Cass. 3 avril, 1912, D. 1915. 1. 71. Cf. Req. 15 mars 1911, D. 1911. 1. 382.)

Les engagements de rémunération pour démarches auprès de fonctionnaires publics en vue de faire obtenir grâce au crédit de leur auteur, des emplois, commandes, ou concessions ont constamment été déclarés nuls comme ayant une cause illicite. (Démolombe. 24, n. 378; Aubry et Rau, 4th ed. 4, p. 322.)

English law.

The English law is without doubt the same. Thus an agreement whereby a member of Parliament in consideration of a salary paid to him by a political association agreed to vote on every subject in accordance with the directions of the association is an invalid agreement. (*Osborne v. Amalgamated Society of Railway Servants*, 1910, A. C. 87, 79 L. J. Ch. D. 87. See Pollock, *Contracts*, 8th ed. p. 339; Anson on *Contracts*, 14th ed. p. 243.)

Contracts to resign official position.

Contracts are unlawful by which a public official undertakes to resign his office on receipt of a sum of money to be paid him by a private individual. Public offices are not to be made the object of private bargains. The purpose of such a contract being to create a vacancy in order that the other party to the contract or some *protégé* of his may obtain the position, it tends to interfere with the choice of the best candidate. (Paris, 30 janv. 1857,

D. 59. 5. 194; Larombière, art. 1128, n. 19; B.-L. et Barde, 1, n. 250; D. N. C. C. art. 1133, n. 59.)

If the agreement is that A is to resign and that B if he is appointed shall pay to A a proportion of the salary during A's lifetime, this is against public interest upon another ground. Government salaries are supposed to be fixed on a scale sufficient to enable the official to maintain his position suitably. This purpose would be frustrated if officials were under obligations depriving them of the use of a part of their salaries. It would be unfortunate for the public service if the holders of offices were impecunious dummies who had to pass over a great part of their salaries to persons behind the scenes. Such officials struggling with inadequate incomes might be tempted into dishonesty.

In France, by special legislation the holders of certain offices have a right to nominate a successor and may obtain a price which is subject to the control of the government. A secret agreement to pay a price higher than that which is indicated in the apparent deed of sale is against public policy. (See loi des 28 avr.—4 mai 1816, and D. N. C. C. *Appendice* to art. 1598, and *Additions*, 1913, to same art.; Aubry et Rau, 5th ed. 4, p. 551; Dijon, 26 janv. 1894, D. 96. 2. 11.)

English law.

The rules of the English law are similar. "Public policy" it has been said "requires that there shall be no money consideration for the appointment to an office in which the public are interested." (*Blachford v. Preston*, 1799, 8 T. R. 89, 4 R. R. 598.)

And the same rule applies to the assignment of the salaries of public offices, or of government pensions. "It is fit that the public servants should retain the means of a decent subsistence without being exposed to the temptations of poverty." (Per Lord Abinger in *Wells v. Foster*, 1841, 8 M. & W. 151, 58 R. R. 650. See Pollock, *Contracts*, 8th ed. p. 343; Anson, *Contracts*, 14th ed. p. 243.)

Contracts which interfere with administration of justice.

Pactum de quota litis.

A contract by which the client undertakes to compensate a lawyer who conducts his case by surrendering to him in the event of success a share of the property recovered is an unlawful con-

tract. Such an agreement was called in the Roman law *pactum de quota litis*, and was prohibited by that law. (Dig. 50. 13. 1. 12; Dig. 17. 1. 6. 7.) The French law has always followed the same rule. (Merlin, *Rép.* vo. *Pacte de quota litis*; Dall. *Rép.* vo. *Avocat*, n. 269; Garsonnet, *Traité de Procédure Civile*, 3rd ed. v. 1, s. 259; Aubry et Rau, 5th ed. 4, p. 553; Cass. 22 avril 1898, D. 98. 1. 415. Cf. in Quebec, *Buckley v. Riou*, 1910, R. J. Q. 20 K. B. 168.)

Such agreements are invalid also by the English law. (Re *Attorneys and Solicitors Act*, 1875, Ch. D. 573, 45 L. J. Ch. 47; *In re A Solicitor*, 1912, 81 L. J. K. B. 245. See Law Journal, 1912, p. 193; Pollock, *Contracts*, 8th ed. 350; Anson, *Contracts*, 14th ed. 245.) The reason is substantially the same as that of the law which prohibits an advocate from purchasing litigious rights. (See C. E. E. 257/324.) In both cases there is a risk of the lawyer taking an unfair advantage of his professional knowledge. In the *pactum de quota litis* the lawyer and the client do not deal on equal terms. The client is not in a position to judge whether his case is a good one or not. If such agreements were valid, a dishonest lawyer might succeed in obtaining a remuneration much in excess of what was fair. Against this it may be said that a poor client who has a very doubtful case may be unable to find a lawyer to undertake his case for him, whereas, if the *pactum de quota litis* were allowed, some lawyer might be willing to run the risk of losing his time and money on the chance of substantial gain in the event of success. For these reasons it has been doubted in modern times whether the *pactum de quota litis* is really against public policy. In most American states it is permitted unless the lawyer also agrees to prosecute the suit at his own expense. (See Pollock, *Contracts*, 3rd American ed. 451.) And the President of the English Law Society in London, in his annual address for 1912, advocated a change of the law. (Law Journal, 1912, p. 577.) At present, however, the prohibition exists both in the French and in the English law.

Nor is there any reasonable doubt that the prohibition forms a part of the Egyptian law also. The codes give the courts power to control the remuneration fixed by the contract to be paid to a mandatary, though, as we have seen, this power will be exercised only in exceptional circumstances. (C. C. E. 514/628; see C. A. Alex. 21 mai 1908, B. L. J. XX, 240.) But, besides this protection which the client enjoys, he can always challenge

an agreement made with his lawyer which is of the nature of a *pactum de quota litis*. The Egyptian legislator certainly did not intend to reject the traditional rule of the French law in this matter. As M. De Hults says, *il s'agit d'une stipulation d'honoraires, qui revêt une forme qui a toujours été prohibée par les règles professionnelles, mais qui offre peu d'inconvénient en Egypte où, d'après les principes du mandat, les honoraires même convenus d'avance, sont toujours soumis à l'arbitrage du juge.* (Rép. co. Vente, n. 51.) The courts hold the *pactum de quota litis* void as against public policy. (C. A. Alex. 24 déc. 1896, R. O. XXII, 96.) The principle has recently been applied to a contract made between a client and an *agent d'affaires*. Contracts made with persons of this class are viewed with great suspicion by the court, and if the *pactum de quota litis* is against public policy when made with an advocate, it is so *a fortiori*, when made with an *agent d'affaires*. The general rule is thus stated in this case: *Est nulle pour cause illicite la convention intervenue entre un plaideur et un agent d'affaires, et par laquelle le premier cède au second une quote-part des condamnations à intervenir à son profit, en échange des peines et soins de l'agent d'affaires au cours du procès.* And the judgment proceeds to say: *Que l'assistance gratuite des pauvres qui est une charge honorifique et obligatoire de l'Ordre des Avocats ne saurait jamais être l'objet d'une spéculation, et moins encore de la part de ceux qui, sans être avocats, font une concurrence déloyale au Barreau, et profitent de l'ignorance des justiciables pour mettre un prix aux petits services qui, faits sous la direction compétente d'un avocat, ne donneraient pas lieu à des honoraires.* (Trib. Somm. Alex. 28 févr. 1914, Gaz. Trib. IV, n. 230.)

Agreements not to give notice of a crime or not to prosecute.

It is in the public interest that offenders against the criminal law should not go unpunished, and therefore all agreements are void which aim at ensuring immunity for an offence. (Aubry et Rau, 5th ed. 4, p. 550.)

The right to denounce the criminal and to put the machinery of the public prosecution in movement is given in the public and not in the private interest and it cannot be renounced. (See Rev. Trim. 1912, p. 975; Rev. Crit. 1890, p. 101; Crim. 25 févr. 1897, S. 98, 1. 201.)

The victim of a crime, for example the man whose property

has been stolen, is, it is true, not bound to denounce the offender. He may, if he likes, forgive him. But it is against good morals to allow the victim to stipulate a payment for his silence. It is not illegal for the criminal to promise to make reparation to the victim, as by restoring to him the stolen property or by making good to him the loss which he has caused. But stipulations of this kind will always be regarded by the court with suspicion, and if the amount promised is disproportionate to the loss suffered, it will be reduced. Such compromises will stand good, however, when they appear to be fair and honest and free from any special intimidation. (B.-L. et Barde, 1, n. 84; D. N. C. C. art. 1112, n. 44. See cases in Rev. Trim. 1912, p. 975; D. Supp. vo. *Transactions*, n. 62; B.-L. et Wahl, *Contrats Aléatoires*, n. 1262; and see *infra*, p. 296.)

In France the distinction is made between the *action civile* and the *action publique*. The party injured may validly compound as to the first but this does not bar the public prosecution. (See Crim. 25 févr. 1897, S. 98. 1. 201, and the cases in Rev. Trim. 1912, p. 975; and Garraud, *Traité d'Instruction Criminelle*, 1, p. 254.) In an Egyptian case the thief had given his victim a bill for P.T. 35,000—*Valeur reçue comptant*.

Upon proof that the bill was given to induce the victim not to prosecute, but that the loss caused by the theft was about P.T. 12,000, the bill was reduced to that sum. (C. A. Alex. 2 déc. 1885, R. O. XI, 12.) The principle that it is against good morals to allow a man to make money by agreeing not to prosecute is one which goes back to the Roman law. (Dig. 12. 5. 5; Larombière, art. 1133, n. 12; D. N. C. C. art. 1133, n. 523. Cf. in Quebec, *Cie. Montréal-Canada d'Assurance v. Therrien*, 1909, R. J. Q. 18 K. B. 490.) And in England also, agreements for the purpose of stilling a criminal prosecution are void. It is against public policy to allow the compounding of a felony. (*Williams v. Bayley*, 1866, L. R. 1 H. L. 200, 220, 35 L. J. Ch. 717; *Windhill Local Board v. Vint*, 1890, 45 Ch. D. 351, 59 L. J. Ch. 608; Pollock, *Contracts*, 8th ed. p. 344; Anson, *Contracts*, 14th ed. p. 244. So, likewise, when an offender has been tried and convicted an agreement by him or by another to pay a remuneration to a person for exerting his influence to obtain the release of the prisoner or a commutation of the sentence is plainly against public policy. (Trib. Civ. Sedan. 23 mai 1900, D. 1901. 2. 203.)

Renunciation of rights connected with the trial of actions or with procedure.

It is a matter of public policy that justice shall be fairly administered, and a contract which would tend to make a court pronounce a judgment in violation of justice is against public order. So, a renunciation beforehand of the right to a fair trial would not receive effect. In criminal matters especially the accused is entitled on grounds of public policy to set up all legal defences, and the consent of an accused person that in the procedure at his trial any of the essential rules intended to secure justice should be violated would not be binding upon him. (See D. *Rép.* vo. *Nullité*, n. 54.) But the principle applies in civil matters also, and renunciations will be against public policy if they are intended to debar the party making them from the right to claim the benefit of rules of procedure or rules of evidence which are laid down upon grounds of general interest. Not all the laws of evidence and procedure, however, are laws of public order. Some of them are based upon considerations of public policy, whereas others give rights to the parties which they are free to renounce or abandon if they choose. And it is in some cases a delicate question whether the rule is one which can be waived or renounced by the party who has an interest in enforcing it, or whether the law will not allow him to waive it because it is based upon public policy. (See Garsonnet et Cézard-Bru, *Traité de Procédure Civile*, 3rd ed. 1, n. 446.) If the rule is a rule of public order it cannot be waived by the party, and moreover, it is the duty of the judge to enforce the rule *ex officio*. It does not often happen that a party renounces beforehand rights of this kind. Such questions commonly arise when it is said that he has abandoned his right expressly or tacitly during the trial by not taking a plea to which he was entitled, or by allowing the violation of a rule upon the enforcement of which he might have insisted. But such a renunciation accepted by the other party is a contract and is governed by the rules which apply to contracts. If the defendant has a right to plead a certain defence or exception which is given to him on grounds of public policy his renunciation whether express or tacit of the right to take the plea is an illicit contract. For one cannot abandon a right which is founded upon public policy. (Garsonnet et Cézard-Bru, *Traité de Procédure Civile*, 3rd ed. 1, n. 446.) With regard to some of the rules of procedure there is little difficulty in deciding that they are based upon public policy.

Right to tender decisive oath. 224

The right given to either party to tender the decisive oath to the other is based upon public order and cannot be renounced. (See C. C. E. 224/289.) It would be an easy way of evading the laws which prohibit certain kinds of contracts if it could be stipulated beforehand that the decisive oath should be excluded. The tender of the decisive oath is frequently the only means of exposing the unlawful nature of the contract. Accordingly, where the debtor in a promissory note had renounced his right to tender the decisive oath to the creditor in any dispute between them about the note, it was held the renunciation was invalid. (Trib. Comm. Caire, 27 dec. 1913, Gaz. Trib. 4, n. 163.) Where the cause of a bill is not stated or a false cause is given there is frequently no way of proving the true cause of the bill except by tendering the decisive oath. This may not be successful, but to allow the party to renounce this chance would lead in many cases to unlawful contracts being undiscovered.

Prorogations of jurisdiction.

A contract may be valid by which it is agreed to give jurisdiction to a court, which, apart from the contract, would be incompetent to deal with the question between the parties. But this depends upon the character of the incompetence.

Incompetence is of two kinds:—

(1.) *ratione materie*, and

(2.) *ratione persone*, and it is only the first kind of incompetence which is a matter of public order. There is a regular hierarchy of courts, each of which is charged by the state with jurisdiction to deal with certain matters. It is clear that no agreement of parties can give to any of these courts the power to deal with a case which belongs to a class which is outside the competence of the court. (See Baudry-Lacantinerie et Houques-Foureaud, *Personnes*, I, No. 268 *seq.*; Aubry et Rau, 5th ed. 1, p. 178; Req. 14 févr. 1866, D. 66. 1. 447; D. N. C. C. art. 6, n. 25.)

So, for example, the Native Courts in Egypt are incompetent to deal with questions relating to the public debt, which are specially given to the Mixed Courts, or with suits as to the constitution of *wakfs*, as to marriage, and questions connected with marriage, such as the dowry, and as to gifts, legacies, successions, and all other questions which belong to the *statut personnel*,

and are therefore within the competence of the *Mehkemehs*, or religious courts. (*Decree of Reorganisation*, art. 16.) The incompetence of the Native Courts to deal with these matters is a part of the organisation of justice, and it is upon grounds of public order that the state has decided that certain classes of cases are to be assigned to different kinds of courts. It is clear in this case that the agreement of parties cannot give competence to a court which is excluded by law from dealing with that kind of matter at all. But under the Egyptian codes the incompetence based on the value of the cause is not a matter of public order. The judge who sits as a tribunal of summary justice is by law entitled to try without appeal matters purely personal where the ascertained amount in dispute does not exceed a certain sum. (N. C. Proc. 26; M. C. Proc. 28.) But if the parties consent he may try without appeal matters where the amount in dispute exceeds this sum. (N. C. Proc. 27; M. C. Proc. 29.) He has jurisdiction to deal with personal actions of a certain amount, and the parties can give him competence to deal with such actions of a larger amount. The Mixed Code of Civil and Commercial Procedure makes it clear that the plea of incompetence—*ratione materie*—is always a matter of public order. It declares: *Want of jurisdiction by reason of the matter in dispute may be raised at any stage of the cause, and even pronounced by the tribunal of its own accord* (art. 149). It is plain, therefore, that this plea cannot be renounced by the parties either expressly or tacitly, that it may be raised at any stage of the proceedings, and even raised for the first time on appeal, and that the tribunal may give effect to it *ex officio*, or on the motion of the *parquet* if the parties from ignorance or any other reason do not take the plea. (See Lusena Bey, *Eléments de Procédure Civile*, 4th ed. 1, p. 235.) But when the court is incompetent, merely because the amount in dispute is too large, the parties are at liberty to waive the plea. (M. C. Proc. 29.) The Native Code of Procedure is less clearly expressed. It says: *Les exceptions d'incompétence, même à raison de la matière du litige, et les demandes de renvoi pour connexité ou litispendance doivent être proposées avant toutes exceptions et toutes conclusions sur le fond de la demande principale, incidente ou reconventionnelle contre laquelle le déclinatoire est proposé.*

Dans les cas seulement où l'incompétence est fondée sur les articles 15 et 16 du décret de réorganisation des tribunaux indigènes, elle pourra être proposée en tout état de cause et même prononcée d'office. (N. C. Proc. art. 134.)

But as regards the plea of incompetence *ratione materie* the exception stated in the article is much more important than the rule itself. Reference to the *Decree of Reorganisation of 14 June, 1883*, shews that articles 15 and 16 of that Decree are the general articles which determine the competence of the Native Tribunals. (See the Decree in Gelat, Rep. IV, p. 400.) These tribunals are to have jurisdiction over all contestations civil and commercial between natives, over all contraventions and crimes committed by natives, excepting only certain matters given to the Mixed Courts, but are to be incompetent to deal with any question as to the property of the public domain, as to the public debt, the constitution of *wakfs*, and the *statut personnel*. (See for details, Lusena Bey, *Eléments de Procédure Civile*, 1, p. 1.) In spite, therefore, of the misleading language of the article, it is clear that the plea of incompetence *ratione materie* is a matter of public order under the Native Code as well as under the Mixed Code.

Incompetence *ratione personæ*.

The cause may belong to a class over which the court has jurisdiction, but the defendant may nevertheless have the right to take the plea of incompetence because he is entitled to have the case tried in the court of another district. For example, if the action is a civil action as to moveable property, he must be summoned before the tribunal of the district in which he is domiciled. Or, if the action relates to real rights, before the tribunal of the district in which the property in dispute is situated. (N. C. Proc. 34; M. C. Proc. 35.) If the defendant is summoned in any other court he may plead that this court is incompetent *ratione personæ*. But public order is in no way concerned in his taking this plea if the court is of the rank and possesses the qualifications required of courts which deal with that kind of case. The defendant's right to object that it is not his own proper court is a privilege that is given to him, and he can waive it if he likes. Such a waiver by him of his right to take the plea is called a *prorogation of jurisdiction*. (Garsonnet et Cézard-Bru, *Traité de Procédure Civile*, 3rd ed. 1, nos. 466, 467; Dall. Code Proc. Ann. art. 59, n. 408; Dall. Code Proc. Supp. art. 59, n. 1182; Req. 15 juill. 1875, D. 76. 5. 226; C. A. Alex. Gaz. Trib. 3, n. 15; C. A. Alex. 22 mai 1912, Gaz. Trib. 2, p. 178, s. v. *Exécution*.) In the Mixed Courts in Egypt there is, speaking broadly, no jurisdiction over native Egyptians when they are the

only parties, and this is a matter of public order. If both the parties to a suit are native Egyptians they cannot agree to submit their case to the Mixed Courts. The competence of the court depends on the quality of the parties to the suit and not on that of their mandataries. The jurisdiction of the Mixed Courts in fact depends upon the nationality of the parties, and their incompetence to deal with cases between Egyptians or between foreigners of the same nationality is an incompetence *ratione materie*. (See C. A. Alex, 27 nov. 1912, B. L. J. XXV, 37; Lusena Bey, *Eléments de Procédure Civile*, 1, p. 127.)

Other preliminary exceptions which are based upon considerations of public order.

Besides the plea in bar of the jurisdiction to which the cause is assigned the defendant is entitled to make an application to transfer the cause to another tribunal to which the same or a connected cause has been assigned. But are these pleas—*demandes de renvoi pour connexité ou litispendance*—based on public order? If the defendant does not take these pleas at the beginning and allows the case to go on will he be held to have abandoned his right to these preliminary objections? In France it is much disputed if public policy is involved in these pleas. It is argued that there is a public interest to prevent the multiplication of actions and the wasting of judicial time by having the same question tried in two courts instead of one. But on the other hand, it is maintained that these exceptions are merely for the benefit of the party, and that he can therefore waive his right to take them. In France the controversy is still open. (Garsonnet et Cézard-Bru, *Traité de Procédure Civile*, 3rd ed. 3, n. 473.) Under the Egyptian Codes it seems to be clear that the pleas of *litispendance* and *connexité* can be waived by the party entitled to take them. (N. C. Proc. 134; M. C. Proc. 148.)

Contracts to oust jurisdiction.

It is not always a matter of public order that disputes in civil matters arising between two parties shall be decided by the tribunal which, apart from agreement, would have jurisdiction over it. The parties may agree to substitute for the proper court a court of their own selection provided the court they select is not incompetent *ratione materie*. But the hierarchy of the courts is matter of public order. The parties cannot by agreement submit a ques-

tion to a court of appeal in the first instance, *i.e.*, without first going to the court or courts below. (Nancy, 1er avr. 1909, D. 1910. 2. 210. See Garsonnet et Cézard-Bru, *Traité de Procédure Civile*, 3rd ed. 1, n. 467.)

(2) But there is nothing contrary to public order in the parties agreeing to accept as final the judgment of the court of first instance and to renounce their right of opposition or appeal.

The Codes of Procedure expressly give the parties the right to agree to submit their differences to the *tribunal de justice sommaire* for final decision. (C. Proc. E. 27/29.)

(3) And they can agree to submit to the decision of arbiters. *A fortiori* they can agree to accept as final the decision of the civil court which has competence in the matter, and to renounce their right of appeal. (C. A. Alex. 10 mai 1917, B. L. J. XXIX, 418.)

Is it a matter of public order that the parties select a court of their own country? (Dall. *Supp.* vo. *Lois*, nos. 450 *seq.*; Nîmes, 20 août 1868, D. 68. 2. 18.)

Is it, for example, a matter of public order that all disputes arising out of a contract executed in Egypt should be determined by Egyptian courts? If the parties make a contract in a foreign country, may they, if they choose, provide that all disputes arising under the contract shall be determined by the courts of the country where the contract is made? Or, without going so far as this, may they say that disputes between them as to the contract shall be decided by the *lex loci contractus*? Such a clause as this last would, according to the French jurisprudence, not oust the jurisdiction of the *lex fori*. But if a question arose as to the contract the court of the *lex fori* would apply the foreign law which the parties had designated, unless this foreign law was itself against public policy. This last clause fixing the law of the contract is, without doubt, perfectly valid. (Cass. 13 août 1879, D. 80. 1. 85, and *sur renvoi*, Amiens, 11 août 1880, S. 81. 2. 10; *Journal du Palais*, 81, p. 572; D. N. C. C. art. 6, nos. 33 *seq.*)

The question is more difficult whether the parties can oust the jurisdiction of the courts of the country in which the case would come up apart from stipulation.

According to much French jurisprudence the parties may validly attribute to a particular court, even though it be the court of a foreign country, the exclusive competence to decide all questions arising out of the contract. In particular, in regard

to the contract of carriage of goods, the *Cour de Cassation* has decided in several cases that it is lawful to insert a clause that all questions arising out of the contract are within the exclusive competence of one particular court, and that irrespective of the place where the contract was made or where it is to be executed. (Cass. 1er févr. 1898, D. 1898. 1. 88; Cass. 26 oct. 1909, D. 1911. 1. 416; Cass. 16 févr. 1898, D. 1903. 1. 398. But see *infra*, p. 145.) And in a Quebec case it was held: The stipulation in a bill of lading executed in a foreign country that "all disputes regarding this bill of lading are to be settled according to the law of the Empire of Germany, and decided before the Hamburg law courts," is not contrary to public order, and will be recognised and enforced by the courts of this province. And it was likewise held that such a condition agreed to by the shipper of the goods was binding upon the consignee. (*Nicholson v. The Hamburg American Packet Co.*, 1904, R. J. Q. 25 S. C. 34.)

But in Egypt the Mixed Court of Appeal has declined to follow the French jurisprudence upon this point, and has held that such a clause was null when its effect would be to oust the jurisdiction of the Mixed Court, it being a matter of public order that this court should be the *forum* for the determination of disputes between foreigners and Egyptians arising out of contracts to be executed in Egypt. (C. A. Alex. 9 mai 1917, B. L. J. XXIX, 410.)

Besides this reason, the Mixed Court of Appeal relied upon a more general ground, namely, that such clauses are exorbitant and abusive. The consignee in Egypt, if he has to seek his relief from the court of a foreign country where he has no representative, is in a most unfavourable position. If the dispute is, say, as to the condition in which the goods arrived in Egypt it will be extremely difficult and expensive for him to prove the facts upon which he relies before a court at Genoa or Palermo. Although, as explained elsewhere, the courts will not, in general, hold a contract to be against public policy merely because it is unjust, this rule is not without exception. There is a decided tendency in the French jurisprudence to hold that a contract may be invalidated upon this ground when the parties to it were not upon an equal economic footing, and one of them has exploited his position of economic superiority to the disadvantage of the other party. This new principle has been applied particularly to clauses by which carriers stipulate for non-liability for fault. (See *infra*,

2, p. 271; Colin et Capitant, 2, p. 13; Lyon-Caen et Renault, *Manuel de Droit Commercial*, 11th ed. n. 524.)

But the principle may be extended and made to apply to clauses proroguing jurisdiction. As the Mixed Court point out, it has been extended to such clauses by a recent French *loi* as to contracts of insurance, except marine-insurance.

By the *loi du 2 janv.* 1902 (Tripier et Monnier, 1915, p. 986); the parties to contracts of insurance are not allowed to agree to substitute another court for the court to which competence is given by that *loi*. The Mixed Court applies the same principle to contracts of carriage of goods, at any rate when, as in the case before it, the exclusion of the ordinary court leads to a serious hardship to the consignee.

But without selecting a court to decide their differences, the parties may select a private individual or a group of private individuals, by whose decisions they agree to be bound. Some of the cases, such as the agreement to submit to arbitration, or the agreement to be bound by the rules of a society or club, will need to be noticed specially. But it is a general principle that where the parties have set up a domestic forum, as it has been called, or have substituted private justice for public justice, the courts still retain a certain right of control. Where it is provided that a certain person is to be the judge the law will allow effect to this, but his decision must be made in a judicial manner. If it is made in a way which violates the elementary rules of justice the court can set aside the decision. In France this right of the courts is commonly referred to the principle which prevents the abuse of rights. (See Poitiers, 27 juill. 1894, S. 96. I. 213; Demogue, R., *Notions fondamentales du droit privé*, p. 634, chap. on *La justice privée*, and cases to be mentioned presently under Arbitration and Clubs.)

532 Clauses of compromise or arbitration.

The law allows the parties as a general rule to make an agreement that the dispute between them shall be submitted to the arbitration of a third party instead of being brought before the court. Such an agreement will of course be ineffectual when the question between the parties is a question as to a right of status, or any right which is based upon public policy, because, for the reasons already fully explained, the agreements of parties cannot affect rights of this kind. (See C. C. E. 533/654; C. C. F.

2046. But when the matter of dispute between the parties is not of this kind they may agree to submit it to arbitration. In France this liberty is considerably restricted by the provision of the Code of Civil Procedure that the parties cannot agree beforehand to submit to arbitration questions which have not yet arisen. They cannot insert a clause in the contract which they make that if a dispute shall arise between them as to the interpretation of the contract or as to the question whether there has been a breach of it this shall be referred to arbitration. This general clause called *clause compromissoire* is prohibited by the French Code. (C. Proc. Civ. F. art. 1006; Cass. 26 juill. 1893, D. 94. 1. 61; Planiol, 2, n. 2305. See the admirable *thèse* of M. Jacques Godron, *La Clause Compromissoire*, Paris, 1916.) But the Egyptian codes do not prohibit such a clause. *The parties have the right to agree in a general way to submit to the decision of arbitrators any disputes which may arise as to the performance of a specific contract or such and such a particular dispute*. (C. Civ. Proc. M. 791.) The Native Code is to the same effect. (C. Proc. Civ. E. 702.) Such clauses involving as they do a derogation from the common law, and creating an exceptional position will be strictly construed and will not be held to cover any case not specified or plainly implied from the terms used. (See Trib. Comm. Alex. 26 mai 1913, Gaz. Trib. 3, n. 358.) But although the parties may in this way renounce their right to have the question between them determined by a court of justice they cannot competently renounce their right to have it determined in a fair and just manner. They may say that there shall be no appeal from the arbiters to the court. But, notwithstanding such an agreement, the matter can be brought before the court if the arbitrators have violated an elementary rule of justice, such as not allowing the parties to be heard, or not giving proper notice to them of meetings at which they had the right to be present. The general rules on the subject are thus stated by the Mixed Court of Appeal: *Les sentences arbitrales sont susceptibles d'appel nonobstant toute renonciation préalable lorsque les règles qui se rattachent à l'ordre public ont été violées. Tel est le cas où les arbitres ont excédé leurs pouvoirs, où ils n'ont pas statué sur une des questions principales à eux soumises et où le droit de défense a été méconnu*.

C. A. Alex. 15 avril 1896, B. L. J. VIII, 207. Cf. Paris, 21 juin 1893, D. 94. 2. 35.

English law.

In the English law an agreement to refer a dispute to arbitration was formerly no bar to an action in the competent court to determine this very matter. But by statute the court has now the power to stay proceedings in such cases and it does as a rule exercise this power which amounts in effect to enforcing the agreement to arbitrate. (See *Arbitration Act*, 1889 (52 & 53 Vict. c. 49); *Edwards v. Aberayron Society*, 1875, 1 Q. B. D. 563; *Alexander v. Campbell*, 1872, 41 L. J. Ch. 478; Anson, *Contracts*, 14th ed. p. 245; Pollock, *Contracts*, 8th ed. p. 348.)

Renunciations made by members of a club or association.

The members who join a club, a trades union, or other lawful association thereby assent to its rules. Among these rules will generally be provisions for the expulsion of members, the imposing of fines, and the like. And the rules frequently declare that there shall be no right of appeal to the courts. But it is well settled in France that a rule of this kind cannot altogether oust the jurisdiction of the courts. It would be against public order to allow full effect to any such rule. (Cass. 18 juin 1872, D. 72. 1. 172, and D. 72. 2. 17; Agen. 12 mars 1891, D. 91. 1. 373; D. *Rép. Pratique* vo. *Associations*, n. 99.) In spite of any renunciation of his rights by the member of such an association the courts will always be entitled to examine:—

(1) If the procedure indicated in the rules has been strictly observed;

(2) If the expulsion or forfeiture was based upon one of the grounds specified in the rules, or, if not so specified, was upon a ground which the member by joining the association tacitly agreed should be a ground for the expulsion or the forfeiture. (See note by M. Planiol to D. 1905. 2. 121.) And

(3) In addition, the court has always the right to set aside the expulsion if the elementary principles of justice were violated, as if no opportunity was given to the member to defend himself. And it has been held that when the expulsion required the votes of a majority at a meeting, and the notice calling the meeting did not specify that this was part of the business, it was the duty of the court to set aside the expulsion. (Trib. Civ. Seine, 4 févr. 1907, Rev. Trim. 1908, p. 117. See Rev. Trim. 1907, p. 823; D. *Rép. Pratique* vo. *Associations*, n. 98. Cf. *Lapointe*

v. *l'Association de Bienfaisance de la Police de Montréal*, 1906, R. J. Q. 16 K. B. 38.) The English law recognises the same principle. (See *Labouchere v. Wharcliffe* (Earl, 1879, 13 Ch. D. 346; Halsbury, *Laws of Eng.* vo. *Club*, p. 415.)

Public policy as to admissibility of proof by witnesses.

A difficult and important question with regard to public policy arises in regard to the rule excluding proof by witnesses in certain cases. When the code declares that if the sum involved in a suit is above 1,000 P.T. the parties shall not be permitted to prove by witnesses the existence of the obligation or its discharge, is this a rule of public order? If it is, then no contract to the contrary is valid. If the party entitled to object to proof by witnesses has not raised the objection when such evidence was offered and has allowed the witnesses to be examined, has he thereby made a binding agreement to waive his right? If he has, he cannot argue in appeal or in cassation that the judgment against him was obtained by the admission of illegal evidence. On the other hand, if the rule is a rule of public order, the failure of the party to take the objection cannot be a waiver of his right, because his right is one which cannot be renounced. And if the party himself does not object to witnesses being examined it is the duty of the judge *ex officio* to refuse to allow the evidence to be received. Upon this point there has been much controversy in France. The article in the Egyptian Codes is based upon the French articles. (C. C. E. 215/280; C. C. F. 1341, 1348.) In France the prohibition of proof by witnesses goes back to the *Ordonnance de Moulins*, 1566. It is generally maintained by the older writers that the prohibition was based upon considerations of public policy, and this view is still supported by most of the writers. (Merlin, *Rép.* vo. *Preuve*, sect. 2, par. 3, n. 28; Larombière, art. 1347, n. 1; Baudry-Lacantinerie et Barde, 4, n. 2518; Colin et Capitant, 2, p. 243.) The reasons of public policy are said to be two, (1) to limit the number of actions by disarming creditors who have not taken the precaution to provide themselves with written proof of their claims; and (2) to prevent the risk of the defendant being found liable on the evidence of witnesses whose testimony had been suborned. (Planiol, 2, n. 1106.) Some authors however disagree with this view. (Demolombe, 30, n. 215; Colmet de Santerre, 5, n. 325, *bis*, 11; Hue, 8, n. 290.) And the French

jurisprudence appears to be settled in the sense that the prescriptions of the article are not matters of public order, and, therefore, that a party may renounce the protection which the law gives him. (Cass. 8 juin 1896, D. 97. 1. 464; Cass. 15 déc. 1903, D. 1904. 1. 181; Req. 18 juill. 1907, D. 1910. 1. 79; Cass. 13 déc. 1911, D. 1912. 1. 158. See Garsonnet et Cézard-Bru, *Traité de Procédure Civile*, 3rd ed. 2, n. 310.)

This jurisprudence has been followed by the Supreme Court of Canada. (*Gervais v. MacCarthy*, 1904, 35 Can. Supreme Court Reports, 14, reversing R. J. Q. 14 K. B. 420.) The reasons for the view adopted by the courts seem convincing. It may be a matter of public policy that the parties to important civil contracts should put their contract into writing, but if it is so the end is sufficiently secured by allowing the party against whom proof by witnesses is offered to object to such evidence. But the public interest does not go further than this. If he chooses to allow proof by witnesses being received this is within his discretion, just as he may if he likes admit his liability. He is sufficiently protected against the risk of suborned testimony by being given the right to insist on proof by writing. It has been suggested that in Egypt there are special reasons for refusing to allow proof by witnesses. (De Hults, *Rép. vo. Preuve*, n. 48.) But if the party himself does not object there seems to be no reason in Egypt any more than in France for refusing to admit such evidence. It is for the court to judge whether the witness is speaking the truth.

The renunciation of the right to object to proof by witnesses is valid unless the matter in dispute is one which no agreement of the parties can affect. If, for example, the question is one of filiation, the consent of one of the parties to allow proof by witnesses would be unavailing, because it is a matter of public order that status should be established according to the rules prescribed by the law. (See Garsonnet et Cézard-Bru, *Traité de Procédure Civile*, 3rd ed. 2, n. 310.) And further, the consent to such proof must be given expressly, or if not expressly, by conduct which clearly shews the intention of the party. His mere silence is not consent if accompanied by conduct which indicates a protest. So, if a party against whom proof by witnesses is offered makes no objection, but does not appear, and allows the judgment to go by default, he will not be held to have abandoned his right to object. He can still raise the defence in appeal. (Cass. 1er juin 1893, D. 93. 1. 445.) The *Cour de Cassation*

states the rule thus:—*La renonciation ne peut avoir effet qu'autant qu'elle résulte d'actes qui sont incompatibles avec l'intention de protester et ne laissent aucun doute sur le consentement de celui dont ils émanent.* (Ib.)

Parties to contract cannot renounce beforehand protection given by law of evidence.

It is generally agreed that the parties who are entering into a contract cannot stipulate beforehand that their obligations may be proved by witnesses if these obligations are of a kind which according to law can be proved only by writing. The law gives the parties certain guarantees, and it is against public interest to allow them to be renounced beforehand. (D. *Supp. Oblig.* n. 1895; Caen, 30 avril 1860, D. 61. 2. 56.) If the contract afterwards becomes the subject of litigation the parties may decide whether they will stand upon their legal rights in regard to the mode of proof, but they cannot give up their legal rights beforehand. The principle is in fact the same as that which applies to prescription. One cannot renounce by anticipation the right to claim by prescription, but one can renounce the right to claim the benefit of the prescription which has been acquired. (C. C. E. 80 108. See *infra*, 2, pp. 540 *seq.*)

Parties may stipulate for proof by writing in cases in which the law does not require it.

The parties to a contract which according to law might be proved by witnesses, such as, for example, a civil contract of which the value is below 1,000 P.T., may, if they choose, stipulate that proof by witnesses shall not be admissible to establish facts which would render one of them liable to the other under the contract. (Req. 30 juill. 1884, D. 85. 1. 439.)

Contracts which contemplate the breach of duty as a citizen.

There can be no doubt that a contract is against public policy by which a man undertakes not to perform his duty as a citizen, and by his duty as a citizen is meant here more than his duty to perform acts which he is directed to do by some positive law, for otherwise this case would fall under the first head of agree-

ments contrary to an express provision of the law. But an agreement is also immoral by which a man binds himself not to do something which it may be right for him to do as a citizen, and which it is in the public interest that he should do. *Salus rei publicæ suprema lex.* (Demolombe, 18, n. 237; B.-L. et Colin, 1, n. 179.) So, it has been held in England that a condition of a legacy was void which declared that the legatee was to forfeit the legacy if he entered into the naval or military service of the country. (*In re Beard*, 1908, 1 Ch. 383, 77 L. J. Ch. 265.) And it must be remembered that this decision was pronounced at a time when service in the army or navy was entirely voluntary.

Contracts to determine status or to interfere with duties arising from the family law. 3

The laws which determine status and the rights and duties which flow from status are laws of public order and cannot be modified by the agreements of parties. This rule is frequently expressed by saying, *l'état des personnes n'est pas dans le commerce.* (Planiol, 1, n. 292; D. N. C. C. art. 2046, n. 26.) A man cannot by contract give away or renounce his nationality, his legitimacy, his filiation, his marriage, his marital or paternal authority, or, in short, any of the rights of status. It is not often that such rights are directly sold, but it frequently happens that they are made the subject of compromise. And the rule is that no compromise of an action in which such a right is claimed or any renunciation or abandonment can be binding upon the party making it. In spite of the compromise or abandonment he is always entitled to claim the status which belongs to him by law. (Planiol, 1, n. 436.) According to some authorities this rule is not absolute. If the compromise is favourable to the status of the person in question it is a valid agreement, but if it is unfavourable to the status the contract is void. (Trop long, *Transactions*, n. 69.)

But this is a mistaken view. The principle is that status is a legal situation created by laws of public order, and that the agreements of parties cannot either give it or take it away or modify it in any particular. For the same reason a party will not be barred from action by his acquiescence in a judgment which has not become *chose jugée*. (Huc, 12, n. 306; Aubry et Rau, 5th ed. 1, p. 178; D. N. C. C. art. 6, n. 46; Req. 13 nov. 1883, D. 84. 1. 103; Cass. 4 nov. 1901, D. 1902, 1. 185.)

Pecuniary rights connected with status.

Although rights of status cannot be modified by contract it is not unlawful to compromise the pecuniary interests which flow from the status. For example, if a man whose paternity is disputed, claims a share in the succession of his alleged father a compromise of his claim would be valid provided it was clearly limited to the pecuniary interest. (See Req. 9 mai 1855, D. 55. 1. 228.) But if the compromise embraces both the status itself and the pecuniary interest, and he receives a sum on condition of his renouncing his claim to the status as well as to the pecuniary interest resulting from it, the whole contract will be void. (Baudry-Lacantinerie et Wahl, *Contrats Aléatoires*, n. 1273; D. N. C. C. art. 2046, nos. 37, 38.) Contracts in which questions of status are involved are numerous and important, and the general rule must be illustrated by examples.

Validity of marriage.

When there is a question as to the validity of a marriage it cannot be settled by any contract between the parties. If the marriage is null by law, no agreement between the parties that they will consider it binding can produce any legal effect, and no renunciation of the right to challenge the validity of the marriage will be binding. (Baudry-Lacantinerie et Wahl, *Contrats Aléatoires*, n. 1261; Laurent, 28, n. 360; D. N. C. C. art. 2046, n. 47.)

Divorce or separation.

According to the same principle, the law of divorce or of separation between husband and wife cannot be varied by the agreement of parties. This is a matter governed by the personal law, and, by some systems, divorce by mutual consent, or at the will of one of the parties, is permitted. But by the French law this is not so. It is the legal duty of the spouses to live together unless a judgment of divorce or of separation has been obtained upon one of the grounds determined by the law. Consequently, any agreement is invalid under which the spouses bind themselves to live in a state of voluntary separation. Pecuniary provisions made to secure the continuance of such a separation, or penalties imposed upon the party who fails to carry out the agreement cannot be recovered. (Pan, 20 juin 1894, D. 95. 2. 11; Cass.

14 juin 1882, D. 83. 1. 248; Cass. 2 janv. 1907, S. 1911. 1. 585; D. N. C. C. art. 229, nos. 14 *seq.*; D. *Rép.* vo. *Oblig.* n. 597.)

English law.

The English law upon separation deeds is different. A contract between the spouses which fixes the terms of an immediate separation to which the parties have agreed is enforceable. It is only agreements as to a problematical future separation which are void. (*Hunt v. Hunt*, 1861, 4 D. F. & J. 221, 135 R. R. 106; *McGregor v. McGregor*, 1882, 21 Q. B. D. 424, 57 L. J. Q. B. 268; Pollock, *Contracts*, 8th ed. p. 325; Anson, *Contracts*, 14th ed. p. 248.)

Contract to do acts which will entitle other spouse to a divorce.

So, contracts between a husband and wife will be void under which it is stipulated that one of them is to do or to pretend to do acts which will give the other the right to claim divorce or separation. For example, in a French case a husband undertook to pretend to commit adultery in order that his wife could obtain a divorce, and promised to pay her an annual allowance. It was held that the agreement was unenforceable. (Trib. Boulogne, 1er août 1907, *Rev. Trim.* 1907, p. 799.)

Paternal authority.

The law gives to the parents of a child, and more particularly to the father, certain legal powers over the children which are comprised under the general name of paternal authority or *puissance paternelle*. This is not the place to discuss the nature and extent of this authority which is governed by the personal law. But it is important to remember that all the rights of control over their children given to parents by the law are so given upon considerations of public interest. They cannot be renounced or varied by contracts, and, in the French law, if property is left to a child subject to the condition that its father shall not exercise some of his paternal rights, such as that of directing the education of the child, the condition is void. (Orléans. 5 févr. 1870, D. 70. 2. 49.) And a contract to the same effect would be void also. (Cass. 3 mars 1902, D. 1903. 1. 81.) But, as will be explained later, there may be rights

connected with the father's authority, but not essential to it, of which he is allowed to divest himself. It is a much disputed question in France if a stipulation made in a contract of marriage that the children shall be educated in a particular religion should be regarded as an abdication of the paternal authority. When the husband and wife belong to different religions such a stipulation is frequently made a condition of the marriage. It may be agreed, for example, that all the children shall be brought up according to the religion of the mother, or that the boys shall be brought up in the religion of the father and the girls in that of the mother. Are such conditions illicit? The better opinion appears to be that by the French law they are. The father's right to direct the education of his children is a right of which he cannot divest himself. Baudry-Lacantinerie, *Le Courtois et Surville. Du Contrat de Mariage*, 1, n. 26; Aubry et Rau, 5th ed. 7, p. 524; D. N. C. C. 372, n. 21. It is argued by some writers that in agreeing to such a stipulation at the marriage the father has not abdicated his authority but has exercised it. In mixed marriages it is said that the only way to prevent discord is to make such arrangements beforehand, and that the marriage contract is the charter of the family. (Planiol, 1, n. 1646.) There is considerable force in this argument, but against it is the consideration that the father's legal duty during the marriage is to direct the education of the child according to his judgment, and that he must be free to decide as he thinks best according to circumstances, and to change his mind if this appears to be desirable. If his hands are tied by any previous engagement he cannot be in the enjoyment of his paternal authority.

Tutorship.

So likewise the institution of tutorship is governed by laws of public order, and the tutor cannot by contract be relieved from any of the duties which are imposed upon him by the law. (See C. C. F. 900, 472; Aubry et Rau, 5th ed. 1, p. 757, note 16.) Where, by the personal law, the father has the legal administration of the property of his minor children it may be a difficult question to decide if this is given to him upon considerations of public order or not. If such legal administration is to be regarded as an essential part of his paternal authority he cannot deprive himself of it by contract. And upon the same principle, if property were left to the children on condition that their father

should not have the administration of it the condition would be void. This is the view of some French authorities. (Demante et Colmet de Santerre, 2nd ed. 2, n. 133, bis III.) But the prevailing view in France is that although the legal administration of the children's property is one of the ordinary attributes of the paternal authority, it is not essential to it. The legal administration can be separated from the paternal authority without in any way destroying that authority itself. (Aubry et Rau, 5th ed. 1, p. 778; Trib. Civ. Châteauroux, 6 mars 1894, D. 95. 2. 75; D. N. C. C. 900, n. 92.) The public policy in all such questions is to protect the interests of the children or wards. Where the contract is clearly in the interest of the child, the court might possibly allow validity to a surrender of some of the rights of guardianship. This, at any rate, has been held by the Supreme Court of Canada in an interesting case. A widow who had no means of support was the legal tutrix of her child. By a contract with her husband's father she undertook to allow him to be appointed guardian of the child and to take charge of its upbringing and education. In an action by her to have this deed set aside as contrary to public policy it was held that in the circumstances the deed was not void. The interest of the child was the ruling consideration. The deed did not separate the child entirely from its mother, but made careful provision for intercourse between them. The mother, according to the French law, is not bound to accept the tutorship, but most authorities hold that having accepted it she cannot renounce it. (C. C. F. 394; Aubry et Rau, 5th ed. 1, p. 631.) The question of the right of the mother to surrender some of her legal rights to direct and control the manner in which her child shall be brought up is discussed in the Canadian case, and the conclusion arrived at there appears to be sound that it depends upon the circumstances, and that the public policy involved is the interest of the child. (*Chisholm v. Chisholm*, 1908, 40 Can. Supreme Court Reports, 115. Cf., however, Grenoble, 11 août 1853, D. 55. 2. 91; Req. 5 mars 1855, D. 55. 1. 341.)

English law.

The English law is very strict in refusing validity to surrenders of parental rights. So an agreement by a mother to transfer to another her rights and duties in respect of an illegitimate child is an illegal contract. (*Humphrys v. Polak*, 1901, 2 K. B. 385, 70 L. J. K. B. 752.)

Legitimacy.

The status of a person as legitimate or illegitimate depends upon laws of public order. It is in Egypt governed by the personal law. (Decree of Reorganisation of Native Courts, 1883, art. 16; *Règlement d'Organisation Judiciaire pour les Procès Mixtes*, 1889, art. 9. See C. A. Alex. 15 mars 1906, B. L. J. XVIII, 150.) No contract by which a child agrees to abandon or renounce the right to claim the status which belongs to him by law can produce any legal effect.

Every person has an imprescriptible and inalienable right to claim the status which belongs to him by law. (C. C. F. 328; Larombière, art. 1133, n. 26.) The child whose legitimacy is in question may, as already explained, make a valid contract as to the pecuniary interest.

Alimentary provisions.

When according to law one person owes an alimentary provision to another in consequence of the relationship between them, this is a right which the person entitled to it cannot alienate. (Baudry-Lacantinerie et Wahl, *Contrats Aléatoires*, n. 1272; Aubry et Rau, 4th ed. 4, p. 663; D. N. C. C. art. 2046, n. 55.) It might be suggested that the interest here is merely pecuniary, and, therefore, that there was no reason why it should not be renounced. But this is not so. The person bound to make an alimentary provision would remain always under a natural duty to do so, although the person entitled to it had renounced his claim. If such renunciations were valid persons of an improvident character would be apt to renounce for a small consideration, or even for no consideration, their future right to claim the provision, and it is the improvident people who will be the most likely at some time to stand in need of aliment. Moreover, it is in the public interest that people should support their relatives and not throw them upon public charity. The French law is quite settled that renunciations of the right to claim aliment are against public order and radically void. (Bordeaux, 26 juill. 1855, D. 59, 5. 24; *Pand. Franç. Oblig.* n. 7807; Baudry-Lacantinerie et Wahl, *Contrats Aléatoires*, n. 1272.)

Restrictions of capacity.

The degree of capacity which a man enjoys is given to him by laws of public order. If he is of full age and capacity he cannot

by contract renounce his rights or restrict his capacity. He cannot interdict himself, and if he is a minor or an interdict he cannot by a contract enlarge his capacity. The restrictions of his capacity which have been placed upon him by law can be removed only in the legal way by his attaining full age, by his being emancipated, or by the interdiction being removed. (Larombière, art. 1133, n. 26; Aubry et Rau, 5th ed. 1, p. 178; Aix. 8 déc. 1896, *sous* Cass. 24 janv. 1899, D. 1900. 1. 533.)

Contracts which interfere with certain kinds of freedom.

(a) Freedom of marriage.

Marriage is, in the public interest, encouraged by the law, and it is against that public interest that unmarried persons should not be free to marry. But the precise extent of this public interest is not always manifest. It seems clear, on the one hand, that a contract not to marry at all is, at any rate apart from some special circumstances, against public policy, but, on the other hand, it is equally clear that a contract may to some extent restrict the freedom of marriage without being contrary to public policy. It is plain that a promise to marry a particular person is not a promise of which the law will compel the performance. But does the law regard the promise itself as null because it is a restriction of the freedom of marriage? If this view is taken the breach of the promise of marriage will not create a liability to pay damages or to pay a penalty which has been stipulated as being a breach of contract. This is the view of the matter which now prevails in France and in Egypt. (Aubry et Rau, 5th ed. 7, p. 41, note 26; Grenoble, 24 mars 1908, D. 1910. 2. 134; D. N. C. C. art. 1133, nos. 345, 355; C. A. Alex. 7 mai 1908, B. L. J. XX, 211.) But the breaking off of the relationship between the parties, although it is not a breach of contract, may, in certain circumstances, be a wrong done to the other party which creates a claim to damages for reparation. (See same authorities.) This subject belongs to the Law of Responsibility. It is easy to see that a contract not to marry anybody but a particular person is against public interest, because it might lead to a large number of people being celibates. But the promise not to marry a particular person is not equally dangerous from this point of view. The person bound by the particular restriction has still a wide field of choice. There is no necessity and, perhaps, no probability that he will remain unmarried. Public policy is not concerned in his being bound not to marry a particular person. These

The next way that is illegal is promising to marry a particular person.

questions as to freedom of marriage seldom occur in regard to contracts, but occur frequently enough in regard to conditions attached to legacies. There is a considerable body of French jurisprudence as to the validity of such conditions. Pothier stated the general rules of the French law in these terms:—*La condition de ne pas se marier absolument est du nombre de celles qui sont regardées comme non écrites étant contraire à l'intérêt public. Mais celle de ne pas se marier à telle ou telle personne est valable. Celle de ne pas se remarier est aussi valable suivant la Novelle 22 ch. 44. que nous suivons.* (Introd. au Tit. XVI, *Contrainte d'Orléans*, n. 64.)

Laws of the revolutionary period invalidated a condition not to marry a particular person, or a condition imposed on a widow or widower not to marry again. But these laws were not reproduced in the French Civil Code. (See Merlin, *Rép.* vo. *Condition*, sect. 2, par. 5, art. 5.) The tendency of the French jurisprudence is to make the validity or invalidity of all these conditions a question of circumstances. (See D. N. C. C. art. 900, nos. 147 seq.; Req. 11 nov. 1912, D. 1913. I. 105.)

As a general rule a condition not to marry at all would be bad, but in exceptional circumstances it might be valid. If the condition is inspired by good motives it is valid, at any rate when it appears to be in the interest of the legatee. The legatee may be of advanced age or in such a state of body or mind as to make it inexpedient that he or she should marry. In such circumstances a condition imposed upon a legacy that it should be forfeited if the legatee married is clearly in the interest of the legatee. (Caen, 16 mars 1875, D. 76. 2. 237; Paris, 1er avril 1862, D. 62. 2. 77, where the legatee, an unmarried woman, wanted to marry at 72 years of age.) *La condition de ne pas se marier, imposée par un testateur au légataire, ne peut être déclarée contraire aux mœurs, et, par suite, non écrite, lorsqu'elle a été inspirée soit par un sentiment de bienfaisant intérêt à l'égard du légataire, soit par l'attachement du disposant pour sa famille personnelle.* (Req. 11 nov. 1912, D. 1913. I. 105, and note by M. Ripert.)

A condition not to marry a particular person would in general be good, but, according to some authorities, it might be bad if the legatee was bound in honour to marry the particular person named in order to repair the wrong done to her reputation. (D. *Rép. Disposit. entre vifs*, n. 143. See Baudry-Lacantinerie et Colin, *Donations et Testaments*, I. n. 175.) In England also a contract not to marry a particular person is probably good unless the in-

tention appears to be to restrain marriage altogether. (See *Scott v. Tyler*, 1788, in 2 White & Tudor's *Leading Cases*; Jarman on *Wills*, 6th ed. 2, p. 1525.) A condition not to marry except according to the rites of a particular church, or not to marry any person who does not belong to a particular religion would appear to come within the principle for which many French writers contend, that any condition is null which tends to interfere with the perfect freedom of conscience of the party. (See Merlin, *Rép.* vo. *Conditions*, s. 2, par. 5, art. 4; Demolombe, 18, n. 261; Laurent, 11, n. 445; Baudry-Lacantinerie et Colin, *op. cit.* n. 180; Bartin, *Théorie des Conditions*, p. 145.) In England such conditions are not regarded as contrary to public policy. (*Hodgson v. Halford*, 1878, 11 Ch. D. 959, 48 L. J. Ch. 548.) And in Canada, in a Quebec case, the Supreme Court has held that the English rule ought to be followed, seeing that the law of Quebec borrowed from the English law the principle of unrestricted freedom of willing. (*Renaud v. Lamothe*, 1902, 32 Supreme Court Reports, 357.)

But if, in the circumstances, the particular restraint may fairly be considered as equivalent to a prohibition of marriage, the restraint will be unlawful. (Dall. *Rép. Dispositions entre vifs*, n. 143.) At an annual festival the custom was to elect a young unmarried woman to be *la reine des reines* for a year. She was to lose this title, and also certain pecuniary advantages, if she married within the year. It was held that these stipulations were not unlawful. (Trib. Civ. Seine, 7 mars 1914, D. 1914. 5. 25.)

Condition not to marry without certain consents.

The condition not to marry without the consent of an ascendant whose consent is required by law is good, but the condition not to marry without the consent of some other designated third person is unlawful. If the law requires the consent of parents to the marriage of their minor children this is upon a ground of public policy. (See C. C. F. 148.) And it cannot therefore be against public policy to promise not to marry without such consent. (Bordeaux, 15 févr. 1249, D. 50. 2. 6; D. *Rép.* vo. *Dispositions entre vifs*, n. 144.) But it is otherwise when the promise is not to marry without the consent of a third party. The parents may be expected to consult the happiness of their children, but it is not equally certain that a third party will do so. It would be dangerous to give to a third party the power to prevent the

marriage or to place a heavy penalty upon it. (See Douai, 22 juill. 1907, D. 1907. 2. 344; Rev. Trim. 1907, p. 828. Cf. Cass. 6 mars 1905, D. 1905. 1. 450.)

Is the public policy the same with regard to conditions not to marry a second time?

According to some French authorities the condition not to re-marry is always an unlawful condition. It is an attempt to restrict the exercise of a natural right which is protected by the law. (Laurent, 11, n. 501; Hue, 6, n. 60.) Other writers contend that the condition in itself is lawful, and more particularly when, as is generally the case, it is imposed by the predeceasing consort upon the survivor. If the husband, for example, leaves a legacy to his widow, why should he not make it a condition that she should lose it if she remarries? Nay, even if a third party leaves a legacy to a widow or a widower, may it not be made conditional on the beneficiary remaining in a state of widowhood? So, if a son leaves a provision for his mother may he not make it a condition that she shall not marry again? It was held in one case that he might do so. (Montpellier, 14 juill. 1858, D. 59. 2. 107, S. 59. 2. 305, Journal du Palais, 59, p. 130.)

There is no public policy in favour of second marriages, and in France, at any rate, there is a social sentiment against them. (See Larombière, art. 1172, n. 29; the note to D. 1913. 1. 105; and the jurisprudence cited in Bartin, E., *Théorie des Conditions*, p. 251.) But the French jurisprudence is now settled that the condition not to marry again is not to be regarded in itself as necessarily either lawful or unlawful. It is a question of circumstances. Such a condition imposed upon a legacy to a widow would probably be good if she were an elderly woman or in poor health, or there were other reasons which made the restraint a protection for her. But such a condition imposed upon a young woman with no children would probably be against public policy. According to a judgment of the *Cour de Cassation*, even in such a case the *onus* of shewing that the condition was imposed for some reprehensible motive lies upon the person challenging the validity of the legacy. (Cass. 22 déc. 1896, D. 98. 1. 537.) But certainly when it is shewn that such a condition was imposed out of a feeling of jealousy, or from a merely capricious desire to prevent a young woman from marrying, the condition will be invalid. (See Paris, 13 juill. 1911, D. 1912. 2. 192; D. *Rép. Pratique*, vo.

Dispositions à Titre gratuit, n. 59.) Do the same considerations apply to this case as to the case where the condition not to marry is imposed upon a person who has never been married at all? The *Chambre des Requêtes* has recently held that they do. (Req. 11 nov. 1912, D. 1913. 1. 105.) It may be admitted that in some circumstances such a condition would be valid. But it certainly seems that it should be regarded with less favour than the condition against remarriage. In judging of questions of public policy it is permissible to take account of public sentiment, and public sentiment in France is not unfavourable to this condition, at any rate when imposed by the husband upon the wife. It is looked upon as a sort of persistence of the marital authority, it protects the children by the first marriage, and it is in accordance with the public sentiment against second marriages. These considerations do not apply to a condition that an unmarried person shall not marry. Unless the reasons against marriage are in this case very clear it does not seem that such a condition should be treated as valid, and it is very doubtful if a promise made by an unmarried person to pay a penalty if he married would be a lawful promise.

English law as to conditions against marriage.

In England a condition that a widow or a widower shall not marry again is held to be good. (See the notes in *Scott v. Tyler*, in 2 White & Tudor's *Leading Cases*; Jarman on *Wills*, 6th ed. 2, p. 1525.) But an agreement by a bachelor or spinster not to marry at all is void in England. (*Lowe v. Peers*, 1768, Wilmut, 369.) It is not certain whether a contract by a widow or widower not to remarry would be held to be good. Sir F. Pollock says that it would "probably be good." (*Contracts*, 8th ed. p. 368.) The question was raised in an interesting way in the Province of Ontario where the English law prevails. A brother, who was a widower, wanted his sister to come and keep house for him. She had a business of her own and was not willing to give it up without an assurance from him that he would not marry again. Upon receiving this assurance she gave up her business and acted as her brother's housekeeper. Subsequently the brother married again. The sister sued for damages for breach of his promise, and the defence was that the promise was against public policy, and therefore, that no damages could be recovered for the breach of it. This defence was sustained by a Divisional Court. (*Bradley v. Bradley*, 1909, 19 Ontario Law Reports, 525.)

Restrictions upon testamentary freedom.

The French law has taken from the Roman law the principle that a will is essentially revocable. It is a matter of public policy that a man should be free to exercise his right of testamentary disposition up to the time of his death, or, at any rate, so long as he retains the necessary capacity. If he leaves heirs who enjoy legal rights of succession the testator cannot dispose of the shares which belong to them. The disposition of part of his estate is made by law. But with regard to the rest of his estate he has testamentary freedom, and it is against public policy to allow him to limit this freedom. He may dispose of his property as he likes during his life, but he cannot tie his hands as regards the free disposition of his estate after his death, except only in a contract of marriage. These principles are laid down in the French Code in these terms: *Le testament est un acte par lequel le testateur dispose pour le temps où il n'existera plus, de tout ou partie de ses biens, et qu'il peut révoquer.* (C. C. F. 895.)

Les pères et mères, les autres ascendants, les parents collatéraux des époux et même les étrangers, pourront, par contrat de mariage, disposer de tout ou partie des biens qu'ils laisseront au jour de leur décès, tant au profit desdits époux, qu'au profit des enfants à naître de leur mariage, dans le cas où le donateur survivrait à l'époux donataire. (C. C. F. 1082. See Planiol, 3, n. 3165.)

Contracts which restrict freedom of willing.

It follows from this general principle that any promise which tends to prevent a testator from exercising his testamentary freedom is void as against public policy. (Baudry-Lacantinerie et Colin, *Donations et Testaments*, 2, nos. 2707, 2708, and 2708, bis; Laurent, 14, n. 175; D. N. C. C. art. 1035, n. 1.) Such would be, for example, a promise not to revoke a will which he has made or a legacy contained in such a will, or a promise that he will not make a will at all, or that he will make a will in a particular sense. All such promises are in truth pacts concerning future successions. And seeing that a penal clause is void if it is to secure a void promise, it follows that a promise to a person to pay him a penalty if the promisor does not bequeath him a legacy cannot be enforced. (C. C. F. 1227.) This was laid down in the Roman law:—*Stipulatio hoc modo concepta: si heredem me non feceris, tantum dare spondes? inutilis est, quia*

contra bonos mores est hæc stipulatio. (Dig. 45. 1. 61.) The French law is the same. (B.-L. et Colin, *Donations et Testaments*, 2, n. 2708. See D. N. C. C. art. 900, n. 297.)

Such contracts not invalid in English law.

In England agreements of the kind above described are not considered to be against public policy. A contract is valid by which a man binds himself to make some particular disposition by his will, unless this disposition is itself unlawful. (*Brookman's Trusts*, 1869, L. R. 5 Ch. 182, 39 L. J. Ch. 138.) And a covenant not to revoke a will is valid. (*Robinson v. Ommanney*, 1883, 21 Ch. D. 780, 23 Ch. D. 285, 52 L. J. Ch. 440. See Pollock, *Contracts*, 8th ed. p. 367.)

German law.

In the German law a contract by which one binds oneself to make or not to make, or to revoke or not to revoke any testamentary disposition is void. (German Code, art. 2302.)

But the German law allows a man, by what is called a contract of inheritance,—*Erbvertrag*—to make a contract with another by which he confers upon him a right of inheritance, or the right to a legacy. (German Code, arts. 2274 *seq.* See Schuster, *German Civil Law*, p. 622.)

Contracts which interfere with freedom of occupation, freedom of trade, or freedom of competition.

One of the most fundamental principles of the modern French law is that which is commonly referred to as the principle of the *liberté du travail* or the *liberté du commerce et de l'industrie*.

Under the *ancien régime* there were numerous restrictions limiting the freedom of work and of trade, and the *loi de 1791* aimed at sweeping away all these restrictions. *Il sera loisible à toute personne d'exercer tel métier ou tel négoce qu'elle jugera convenable.* (2—17 mars 1791.) Every man is to be free to dispose of his labour, his skill, or his property according to his own judgment, and these rights are, as matter of public order, imprescriptible and inviolable, and cannot be taken away from him even by his own consent. It is against public policy to restrain a man from earning his living in any manner that suits him best,

or from carrying on any kind of lawful business. If a man were allowed to bind himself by contract not to do anything at all this would tend to deprive the public of services which were useful to the community; and if a man were to be allowed to bind himself not to carry on his own special kind of business this would likewise be against the public interest, because the presumption is that a man is best at his own trade. It is further in the public interest that there should be free competition amongst those who sell goods, especially such goods as are among the necessities of life. Certain combinations or coalitions, the purpose of which is to create a fictitious price are prohibited by the penal law. And under these broad rules of public policy as a man is free to contract with any person whom he pleases, so he is in general free to refuse to contract, and it is not necessary for him to justify his refusal. There is a well recognised exception to this rule in the case of common carriers who are bound to carry passengers and merchandise at the prices fixed by their tariffs, at any rate when no other means of transport are available: (Aubry et Rau, 5th ed. 5, p. 653; Baudry-Lacantinerie et Wahl, *Louage*, 2, n. 3474; Cass. 3 janv. 1882, D. 83. 1. 105, S. 82. 1. 107.)

Apart from this case the general principle is that a man can refuse to deal with anyone if he chooses to do so. (Pouillet, *Traité des Marques de Fabrique*, 6th ed. n. 1280. See Lyon-Caen et Renault, *Traité de Droit Commercial*, 4th ed. 1, n. 212.)

Whether a refusal to trade with a man which is purely malicious and not justified upon any ground of self-interest may amount to an abuse of right is a question which does not belong to this place. (See Rev. Trim. 1905, p. 127; 1908, p. 105, and 1908, p. 289, art. by M. Morin, *Du Refus de contracter opposé en raison de considérations personnelles*, esp. at p. 294.)

But it must not be supposed that the freedom of trade which the law desires to secure is an absolute freedom; it is limited by laws of various kinds. The business must be a lawful business. In the case of sale the thing sold must be an object of commerce. The exercise of certain professions is limited to persons possessing special qualifications. In virtue of the law the state may enjoy a monopoly, or it may have conceded a monopoly to another. And besides such limitations which result from the general law, there may be a conventional limitation of the liberty of trade and commerce. For if no such conventional restrictions were permitted we should be injuring freedom under the guise of pro-

teeting it. There are many cases in which a man could not obtain the best price for his skill or for his property if he were not allowed to limit his freedom of action to some extent. The head of a business may hesitate to engage a new manager, who after becoming acquainted with all the customers and with the secrets of the business, might set up a competing business as soon as his engagement had come to an end. And the trader who sells his business with the goodwill can as a rule obtain a good price only by binding himself not to compete with the buyer. In cases of this kind the difficulty is to draw the line between stipulations which are permissible and those which are unlawful as infringements of liberty. There is a very large jurisprudence on this subject, and only a few points can be noted here. (See Pouillet, E., *Traité des Marques de Fabrique et de la Concurrence déloyale*, 6th ed. 1912, nos. 1100 *seq.* and nos. 1280 *seq.*; *Pand. franç.* vo. *Oblig.* n. 7813; *Pand. franç.* vo. *Liberté du Commerce et de l'Industrie*, n. 202; Lyon-Caen et Renault, *Traité de Droit Commercial*, 4th ed. 3, n. 247; Baudry-Lacant. et Saignat, *Vente*, n. 364; *Dall. Supp.* vo. *Industrie et Commerce*, n. 107; *Req.* 29 juill. 1908, D. 1909. 1. 281; *Req.* 17 mai 1911, S. 13. 1. 253; *Cass.* 17 déc. 1912, D. 1914. 1. 230; *Rev. Trim.* 1915, p. 179; and on the question of the transmission of such restrictions in favour of or against heirs, see *infra*, 2, p. 22.)

Restrictions cannot be absolute.

It is clearly unlawful for the reasons above given for a man to bind himself by a contract not to carry on any business in future. No one can give away his own freedom. And for the same reason, as the codes specially declare, a man cannot hire out his personal services for life. As the Egyptian Code expresses it, *the hire of persons is either for a definite or continuous service for the period fixed by the contract or for a definite piece of work.*

Employees, workmen or domestic servants can only be hired for a limited time. (C. C. E. 401—402; C. C. M. 489—490; C. C. F. 1780; C. C. Q. 1667.)

If the contract of service is one of the prohibited kind it is an absolute nullity, and the servant may break it without incurring any liability for damages. (Baudry-Lacant. et Wahl, *Louage*, 3rd ed. 2, n. 2867; Aubry et Rau, 5th ed. 5, p. 420; D. N. C. C. art. 1780, n. 87.)

The prohibition applies only to services such as those of a

servant or workman which are continuous and place him in a permanent condition of dependance. There would be, for example, nothing unlawful in a doctor binding himself to render his services during his life, for such a contract would not greatly limit his freedom. The engagement may be perpetual although the party does not expressly bind himself for life, as where a person of forty years of age contracts an engagement for sixty years. (B.-L. et Wahl, *Louage*, 3rd ed. n. 2869.) And, in general, it may be said that every contract which restricts for the future the freedom of work of the promisor in a general and absolute manner is an unlawful contract. (Guillouard, *Louage*, 3rd ed. 2, n. 733; Lyon-Caen et Renault, *Traité du Droit Commercial*, 4th ed. 3, n. 546.)

Restriction must be limited either in time or in space.

According to the prevailing opinion in France an employee may validly bind himself not to carry on a certain kind of business at any time in the future provided this restriction is confined to a definite area of reasonable extent. And he may likewise bind himself not to carry on a certain business at all if the limitation is only for a certain length of time. It is frequently said that the restriction is good if it is limited either as to space or as to time. (See Paris, 12 janv. 1898, D. 98. 2. 350; Paris, 21 avril 1896, D. 97. 2. 177; Cass. 14 mars 1904, D. 1904. 1. 613; C. A. Alex. 12 déc. 1901, B. L. J. XIV, 46; Trib. Caire, 27 March 1916, O. B. XIII, n. 120; Trib. Beni-Suef, 22 April 1913, O. B. XIV, n. 95.) Laurent, it is true, maintains that the promise not to carry on a business within a determinate place is only lawful if the restriction is at the same time limited to a certain period. (v. 16, nos. 136 *seq.*) But this opinion has not prevailed.

The editors of the last edition of the work of MM. Aubry et Rau state the rule thus:—*la convention serait valable si l'interdiction d'exercer un commerce ou une industrie avait été limitée quant au temps, ou quant au lieu*, and they cite in support of this proposition a large body of jurisprudence. (5th ed. 4, p. 555, note 16. See also the jurisprudence collected in Pouillet, *Traité des Marques de Fabrique*, 6th ed. nos. 1100 *seq.*, and in Dalloz, *Tables Générales*, vo. *Liberté du Commerce*.) But even this statement of the rule appears to be too broad. The court is bound to consider whether in the circumstances of the particular case the restriction amounts to an unreasonable interference with liberty. And it

may find that this is so even although there is a limitation both as to time and as to place. In a recent case an employee in a commercial house in Indo-China bound himself *à ne pas entrer dans une autre maison de commerce de la colonie pendant les quatre ans qui suivront sa sortie de la maison, à ne pas en fonder une et à s'abstenir de toute affaire pour son compte personnel*. The court found in fact that this interdiction placed the employee, who was a trader, and had no other means of subsistence, in a position which made it impossible for him to live, and the *Cour de Cassation*, in rejecting a *pourvoi*, held: *c'est à bon droit qu'ils décident que la clause litigieuse, bien que limitée dans ses effets à la colonie et à une durée de quatre ans est non seulement contraire à la liberté du commerce et de l'industrie mais encore attentatoire à la liberté humaine et au droit de vivre, et qu'ils refusent à la sanctionner comme contraire à l'ordre public*. (Req. 17 mai 1911, S. 13. 1. 253.) On the other hand, there are special cases in which a restriction of a very general character may be found to be lawful, because if it had been less wide the protection given to the other party would not be adequate. (Cass. 2 juill. 1900, D. 1901. 1. 295.)

Limitations of freedom other than promises to refrain from some business.

Other cases occur in which stipulations are challenged as being infringements of freedom of trade. Important examples are found in regard to syndicates or trades-unions. For example, is an employer entitled to make a stipulation with his workmen that they shall not belong to a syndicate, and that if they join one their contracts of employment shall at once terminate? According to a recent decision of the *Cour de Cassation* this question must be answered in the affirmative, unless it is proved that the employer acted not from motives of self-interest but out of malice against the syndicate. *Le droit qui appartient à tout employeur de choisir librement son personnel implique la faculté de ne pas prendre à son service des personnes faisant partie d'un syndicat ou de n'engager que celles qui n'y étant pas affiliées, renonceraient temporairement pour la durée du contrat à user du droit d'y entrer. Cette convention peut être sanctionnée, pour le cas de contravention, par la résiliation du contrat avec clause pénale. Elle ne deviendrait illicite qu'autant qu'elle serait inspirée non par le souci exclusif des intérêts professionnels de l'employeur*

mais par une pensée d'hostilité contre le syndicat ou le désir d'entraver son fonctionnement. (Cass. 9 mars 1915, D. 1916. 1. 25. See Rev. Trim. 1915, p. 521.) M. Planiol in his note points out what a delicate task of appreciation falls in such cases upon the court. (See D. N. C. C. *Appendice à l'art.* 1382 in *Additions*, 1913, *Théorie de l'Abus du Droit*, nos. 15 *seq.*)

Restrictions made in contracts for the sale of a business.

It is, however, in cases of the sale of a business that the most important questions arise with regard to the validity of restrictions. It is a common term of such sales that the seller binds himself not to compete with the buyer. The principle is the same as in the case of the contract between the employer and the employee that such restrictions are as a general rule valid if they are limited either as to space or as to time. (See authorities in preceding notes. D. N. C. C. *Additions*, 1913, art. 1627; Pouillet, *op. cit.* n. 1105.) [According to one view, in the sale of a business without reserve, there is an implied guarantee that the seller will not compete with the buyer. Such a competition, it is maintained, would be a breach of the implied warranty. It would be analogous to a disturbance of the buyer's possession. He has bought the goodwill of the business and for the seller to interfere with it would be a partial eviction. (Pouillet, *Traité des Marques de Fabrique*, 6th ed. n. 1112; Bourges, 12 nov. 1889, D. 91. 2. 267.) But this will only be so when, upon a reasonable construction of the contract, the sale comprised the goodwill as well as the business itself. It is quite possible for the seller to dispose of his stock-in-trade, business premises and so forth, without including in the sale the goodwill of the business. (Cass. 17 déc. 1912, D. 1914. 1. 230, and the note; D. N. C. C. art. 1626, nos. 100 *seq.*) But when, as is more usually the case, the sale comprises the goodwill, there is an implied warranty on the part of the seller not to compete with the buyer in such a way as to diminish the value of the business which has been sold. This does not necessarily mean that the buyer may not set up a similar business; it may in some cases be possible for him to do so without causing prejudice to the buyer. (Aubry et Rau, 5th ed. 5, p. 76, note 2; *Dissertation* de M. Léon Lacour, D. 1909. 1. 281, note 1—3.) It is, however, not with this implied restriction that we are here concerned, but with express promises to refrain from competition made by the seller of a business. Such promises

are, as a general rule, valid if limited either as to space or as to time. (D. N. C. C. art. 1627, n. 24; B.-L. et Saignat, *Vente*, n. 395; Pouillet, *op. cit.* n. 1105; Cass. 14 mars 1904, D. 1904. 1. 613; and authorities in notes to previous section.) In special circumstances restrictions of a very sweeping nature may be sustained.

So where the inventor of a quick-firing gun sold his invention to a company for a very high price and bound himself not to compete with the company for twenty-five years it was held that this promise was not in restraint of trade. In this case there was no limitation as to space and the seller was forty-six years of age, so that the restriction approached pretty nearly to an absolute one. On the other hand, the purchasers of these guns being not individuals but governments of various countries, it was clear that the production of such guns, even in a distant country, might compete with the new company. (Cass. 2 juill. 1900, D. 1901. 1. 294, *Nordenfeldt*; D. N. C. C. 1133, n. 250.)

But according to the latest jurisprudence the rule that the stipulation is valid if limited by time or space is not a rule without any exception. (See *supra*, p. 166.)

Restriction can be invoked by sub-purchaser.

When it appears that such a restriction imposed upon the seller was stipulated in the interest of the establishment sold and not intended to be merely in the interest of the purchaser as an individual the benefit of the restriction passes with the premises to a sub-purchaser. (Paris, 21 févr. 1900, D. 1900. 2. 476; D. *Supp. vo. Industrie et Commerce*, n. 118; *infra*, 2, p. 22.)

When the restriction is unlawful can the court reduce it within lawful limits?

In principle it appears that this question must be answered in the negative. The court has no power to modify the contract which the parties have made. If they have been foolish enough to make a contract which is contrary to law the court has no choice except to declare the contract null. It may be that this does not leave the buyer of the business without a remedy. In some cases he may have a right of action under the implied warranty, and in some cases there may have been conduct fraudulent or wrongful which will give him a right to claim reparation, but the unlimited

restriction created by the contract must be pronounced a nullity. (Pouillet, *Traité des Marques de Fabrique*, 6th ed. n. 1109; Paris, 28 mai 1895, D. 95. 2. 399.)

Perhaps where the contract contains separate and distinct undertakings each with a different limit of space or time the court might annul some restrictions while leaving others standing.

English law allows separation.

It is a general rule of the English law that a contract, if it is divisible, may be lawful in part and unlawful in part, and the rule has been applied in many cases in England to deeds of this kind where the covenants have been considered to be severable. So, an undertaking not to carry on business in London or Westminster or within 600 miles was held good as to London and Westminster only. (*Davies v. Davies*, 1887, 36 Ch. D. 359, 56 L. J. Ch. 962.) An undertaking not to carry on business as a dealer in real or imitation jewellery in England, the United States, France, etc., was held to be wider than necessary to protect the other party and was cut down to a restriction not to deal in *imitation* jewellery in England. (*Goldsohl v. Goldman*, 1914, 2 Ch. 603, 84 L. J. Ch. 228. See Law Quart. Rev. 1915, p. 187. Cf. *Nicholls v. Strelton*, 7 Beavan, 42, 64 R. R. 10; *Baines v. Geary*, 1887, 35 Ch. D. 154, 56 L. J. Ch. 935; Pollock, *Contracts*, 8th ed. p. 378, 3rd Am. ed. p. 477; Anson, *Contracts*, 14th ed. p. 251.)

Restrictions interpreted in favour of promisor.

The French courts, while holding that they have no power to reduce an unlawful restriction so as to bring it within lawful limits, contrive not infrequently to satisfy the equities of the case by giving a restrictive interpretation to the contract itself. (See Douai, 4 déc. 1900, D. 1902. 2. 187; Req. 3 mai 1899, D. 1901. 1. 394; D. N. C. C. art. 1627, nos. 62 *seq.*)

Thus, if the restriction, although limited as to space and time, is unlimited as to the kind of business this will be interpreted to mean a restriction against carrying on a similar business to the one in question. So, when the manager of a business bound himself *à ne pas s'intéresser dans une autre affaire dans la même ville pendant trois années* this was interpreted to mean a restriction against business of the same kind, not against any kind of business. (Cass. 20 janv. 1891, S. 1891. 1. 440; D. N. C. C. art. 1627, nos. 62 *seq.*) And where the seller of a business bound

himself not to set up a business—(*s'établir*)—within a certain radius it was held that this did not prevent him from selling to people within that radius if his own establishment was outside it. (Paris, 13 déc. 1897; Rev. Trim. 1915, p. 179.) But when the prohibition is not to carry on any trade within the radius this binds the seller to abstain from dealing with persons within it, wherever his own business premises may be situated. (Cass. 17 déc. 1912, D. 1914. 1. 230.)

English law as to agreements in restraint of trade.

There is a striking analogy between the rules of the English law upon this subject and those of the French law. In the English cases, however, there has been a more distinct development. It is now settled that the question as to the legality or illegality of such restrictions turns entirely upon their reasonableness. "It is a sufficient justification, and indeed it is the only justification, if the restriction is reasonable—reasonable, that is, in reference to the interests of the parties concerned, and reasonable in reference to the interests of the public—so framed and so guarded as to afford adequate protection to the parties in whose favour it is imposed, while at the same time it is in no way injurious to the public." (*Nordenfeldt v. Maxim Nordenfeldt & Co.*, 1894, A. C. 535, 565, 63 L. J. Ch. 908, 923; *per* Lord Macnaghten.) In considering whether a covenant in restraint of trade can be enforced the question is whether it goes further than is reasonably necessary for the protection of the interest of the covenantee. Such covenants will be construed more liberally in the case of a vendor and purchaser than in that of an employer and employee. (*Morris, Lim. v. Saxelby*, 1916, 1 A. C. 688, 85 L. J. Ch. 210, House of Lords.) A contract which imposes "servile obligations" is against public order. So when a borrower covenanted with a money-lender that without the latter's consent he would not terminate his employment or remove from his house, or sell his furniture, the contract was held to be void. (*Horwood v. Millar's Timber and Trading Company, Lim.*, 1917, 1 K. B. 305, 86 L. J. K. B. 190. See Pollock, *Contracts*, 8th ed. p. 368, 3rd Am. ed. pp. 467 *seq.*)

Illegal combinations.

Interference with freedom of sales by auction.

The Egyptian Penal Code contains an article dealing with this matter. "Every person who interferes by threats, violence or

force with the freedom of biddings or tenders at any sale, purchase, or letting by public auction, or by tender of moveable or immoveable property, or at any letting by public auction, or by tender of a contract for the execution of works, the supplying of materials, the development of any property or the rendering of any service, shall be punished by imprisonment not exceeding three months or by fine not exceeding L. E. 100, or by both of such penalties." (N. P. C. 299 308.) The Draft Penal Code omits this article as superfluous. (See Commentary, p. 71.) It follows that any contract tending to prevent free competition at an auction is unlawful and must be annulled. And the Egyptian article is based upon article 412 of the French Penal Code. (See Garraud, *Traité du Droit pénal*, 2nd ed. v. 6, n. 2426; *Pand. franç. s. v. Entraves à la liberté des enchères*, see specially n. 89; D. N. C. C. art. 1133, nos. 93 seq.; Req. 5 août 1903, D. 1904. 1. 22; Req. 5 nov. 1906, D. 1907. 1. 64.)

Unlawful coalitions.

The Egyptian Penal Code has two articles directed amongst other things against illegal combinations or coalitions of traders. "Every person who by purposely disseminating any false or defamatory news or notice amongst the public, or by making offers in excess of the price demanded by vendors themselves, or by forming a combination of the principal holders of a particular class of goods or commodities with the object of preventing their sale either altogether or at less than a certain price, or by any other fraudulent ways or means, produces a rise or fall in the price of any goods or commodities, public securities or stocks above or below the price which would naturally result from free commercial competition, shall be punished by imprisonment not exceeding a year or by fine not exceeding L. E. 100, or by both of such penalties.

When such devices have been employed with regard to meat, bread, firewood, coal, or any other article of prime necessity, the maximum term of imprisonment prescribed by the preceding article shall be doubled." (N. P. C. arts. 300, 301/309. 310.) The Draft Penal Code restricts the offence to the case when *fraudulent* means have been used (art. 417. See Commentary, p. 71). These articles are based on articles 419, 420 of the French Penal Code, but the list of articles of prime necessity has been modified. We are only concerned with the part of the article 300 which refers to combinations of the principal holders of a particular class of goods.

The offence struck at in these articles can be committed either

by using fraudulent ways or means to produce a false price, or by forming a coalition independent of any question of fraudulent means. We are not concerned here with the case where fraudulent means have been employed. The prohibition of coalitions among the holders of a particular class of goods belongs to the category of laws in which the legislator has endeavoured to regulate the price of commodities, and more particularly of commodities of prime necessity. Laws directed against monopolies and engrossing, to use the old English term, or cornering, to employ a more modern expression, occur at one stage or another in most systems of law. (See, *e.g.*, in the Roman law, Dig. 48. 12. 2; and in the English law, Blackstone, 4, 159.) But economic and social conditions have undergone such changes that the older laws upon the subject no longer meet the necessities of the case, and these articles of the French Code which the Egyptian Code reproduces are virtually a ~~dead-letter~~. Since the *loi de 21 mars 1884*, legalising *syndicats professionnels* it has become difficult to justify in principle the prohibition of combination among traders to regulate prices. There may be cases caused by special circumstances, such as a war, in which laws of this kind are still useful to prevent the cornering of the necessities of life, but under normal conditions such laws are of little value and are easily evaded. The delict has not been committed unless the combination has succeeded in bringing about a rise or a fall in the price. (Garraud, *Droit Pénal*, 2nd ed. 6, n. 2452; C. A. Alex. 29 nov. 1888, R. O. XIV, 51.) Where there has been a contract of the kind struck at by the penal law the contract is null, but it is well settled in the French law that contracts may be null as interfering with freedom of competition although all the elements of the penal offence are not present. (Garraud, *op. cit.* n. 2460; Paris, 18 déc. 1890, D. 93. 1. 49, 51; Cass. 13 janv. 1879, D. 79. 1. 77; Cass. 11 févr. 1879, D. 79. 1. 345. See C. A. Alex. 3 juin 1891, B. L. J. III, 376.) But the tendency of the jurisprudence is not to annul contracts on this ground except in very strong circumstances. It has been repeatedly held that it is lawful for two traders to make a contract by which each of them limits his operations within a certain radius, and undertakes not to compete with the other in the sphere assigned to him. (Req. 31 mars 1884, D. 84. 1. 366, and cases in Rev. Trim. 1914, p. 123.) Nor is it unlawful for several manufacturers to agree to sell their goods only through a single agency, at any rate when such manufacturers form only a minority of the producers of these products,

and when they have stipulated only for a limited time, and in regard to a limited area, and when the price is left to the fluctuations of the market. (Grenoble, 1 mai 1894, D. 95. 2. 221.) And in another recent case the law is thus stated:—*Le traité intervenu entre plusieurs fabricants à l'effet de mettre en commun les mêmes marchandises pour les vendre à prix égal, n'a en lui-même rien de contraire à l'ordre public ou d'illicite, si les contractants ont eu pour but, non pas de surélever, par la voie de l'accaparement et du monopole le cours de leurs produits en leur attribuant une hausse factice, mais seulement de défendre ces produits contre un avilissement résultant des effets de la concurrence locale et de les maintenir en harmonie avec le jeu naturel de l'offre et de la demande.* (Bordeaux, 2 janv. 1900, D. 1901. 2. 150. Cf. Req. 20 juin 1908, D. 1909. 1. 220; D. N. C. C. art. 1133, nos. 278 *seq.*) Nor is it unlawful for a number of consumers of a certain commodity, such as gas, to agree together that they will not use it until the price is lowered, at any rate unless there is evidence of fraudulent devices. (Paris, 13 janv. 1887, D. 87. 2. 151.) Nor is there anything unlawful in a trader selling to a dealer on condition that the dealer shall not sell similar goods of another manufacturer, or in the seller stipulating that the buyer shall not resell the goods below a certain price. (See Paris, 14 janv. 1902, D. 1903. 2. 298; Pouillet, *Traité des Marques de Fabrique*, 6th ed. n. 1285. See Rev. Trim. 1912, p. 978.) There may be attendant circumstances of fraud which may vitiate such contracts, or they may in some cases be annulled as an abuse of right, but the broad rule is that the seller may impose such conditions as he chooses upon the sale, and conditions of the kind indicated above will not be regarded under ordinary circumstances as illegal restraints of trade. (See the jurisprudence in Pouillet, *op. cit.* arts. 1283 *seq.*)

English law.

In the English law combinations of traders to reduce or prevent competition may amount to an illegal restraint of trade. (*Collins v. Locke*, 1879, 4 App. Cases, 674, 48 L. J. P. C. 68; *Evans & Co. v. Heathcote*, 1917, 2 K. B. 336, 86 L. J. K. B. 1524.) And there is in the United States a large body of jurisprudence to the effect that such agreements are against public policy. (See the cases in Pollock, *Contracts*, 8th ed. p. 372, 3rd Amer. ed. p. 468.)

Other unlawful contracts.

The legality of gaming contracts and of stipulations of exoneration is discussed elsewhere. (See Index under these words.)

Effects of want of cause or of the illegality of the cause.

An obligation which has no cause or of which the cause is unlawful is not voidable; it is void *ab initio*.

The French article says such an obligation *ne peut avoir aucun effet*. (C. C. F. 1131.)

And the Egyptian Code says *an obligation exists only if it has a definite and lawful cause*. (C. C. E. 94/148.)

There can be no reasonable doubt that the Egyptian Code means the same as the French Code.

But if such obligations are radically null or inexistent what are the consequences of this? They are:—

- (1) No action lies to enforce the obligation;
- (2) Any person having an interest may found upon the nullity;
- (3) The court may declare *ex officio* that such an obligation is null, though the nullity is not pleaded by the defendant;
- (4) The obligation cannot be novated, confirmed or ratified, and it cannot become good by any period of prescription;
- (5) According to most writers, that which has been paid in execution of such an obligation may be repeated. (Demolombe, 24, n. 381; Baudry-Lacant. et Bardé, 1, n. 316.)

There is no dispute about any of these points except the last.

Dispute as to the right of repetition of payments under unlawful contracts.

Traditional view.

According to the Roman law in the case of an unlawful contract the right of repetition existed only in favour of a party who was innocent, that is to say, was not privy to the illegality. If both the parties had entered into the contract, knowing of its unlawful character, there was no right of repetition.

The law said that a man was not allowed to come into court founding upon his own turpitude. *Nemo auditur propriam turpitudinem allegans*; and *in pari causa turpitudinis cessat repetitio*. (See Dig. 12. 5. 3; Girard. *Manuel*, 5th ed. p. 622; Charmont, in Rev. Crit. 1899, p. 76; Olivier, *Sanction des obli-*

gations illicites. Thèse, p. 11: Paris, 1er août 1903, D. 1904. 2. 345.)

The old French law adopted the same principle. (Pothier, *Oblig.* n. 43.)

Some of the French writers still adhere to his opinion. They follow the distinctions made by the Roman law.

There are three cases conceivable:—

(1) Turpitude may exist on both sides, as, for instance, where a man pays money to a woman for purposes of prostitution. In this case there can be no repetition.

(2) Turpitude may exist only on the part of the person who has paid. In this case also there can be no repetition: or

(3) Turpitude may exist only on the part of the person who has received the payment, as, for example, if a man pays money to another to induce him not to commit a crime. In this case there is a right of repetition. (Larombière, art. 1133, n. 10, *sub fin.*)

Against this it is argued that this result is contrary to the express terms of the code which says that the obligation can receive no effect, for by allowing the man to keep what he has received in virtue of the contract we are giving to the contract a very important effect. The answer generally made to this objection is as follows:—

The party to the contract who keeps what he has received is not allowed to keep it because he had any right to it under the contract, but because the law refuses to permit the plaintiff to bring an action founded upon his own guilt. (Aubry et Rau, 4th ed. 4, s. 442, *bis*, note 8, p. 741.)

If the basis of the plaintiff's case is that he was a party to a contract of which the law disapproves entirely, the court refuses to listen to him and washes its hands of the affair.

This principle of the Roman law is expressly adopted by many codes. For instance, the Spanish Code says (art. 1306):—

1. *Si la faute est commune aux deux contractants, aucun d'eux ne pourra répéter ce qu'il aurait donné en vertu du contrat, ni réclamer l'accomplissement de ce que l'autre avait promis:*

2. *Lorsque la faute n'existait que chez un seul contractant, il ne pourra répéter ce qu'il aurait donné en exécution du contrat ni demander l'accomplissement de ce qui lui aurait été promis. Pour l'autre qui est étranger à la cause honteuse, il pourra réclamer ce qu'il avait donné sans être obligé d'accomplir ce qu'il avait promis* (Cf. Code Port. 692; German Code, 817; Austrian

Code, 1174. See the note of M. Saleilles to art. 817 of the German Code in the French translation.)

In the English law the rule is that where an illegal contract has been performed in whole or in part there is no right to repetition. Possibly repetition might be allowed if the agreement was actually criminal or grossly immoral. (*Tappenden v. Randall*, 1801, 2 B. & P. 467, 5 R. R. 662; Pollock on *Contracts*, 8th ed. p. 402.) And the execution of the contract does not bar repetition in the case of marriage-brokerage contracts and in the case of gaming contracts when the money has been placed in the hands of a stakeholder. (*Taylor v. Bowers*, 1876, 1 Q. B. D. 291; *Kearley v. Thomson*, 1890, 24 Q. B. D. 742, 59 L. J. Q. B. 288; *Hermann v. Charlesworth*, 1905, 2 K. B. 123, 74 L. J. K. B. 620; Anson, *Contracts*, 14th ed. p. 264.)

French doctrine.

The French doctrine, however, is now almost entirely in favour of the view that repetition can always be claimed of what has been paid under an unlawful agreement, whether the plaintiff was or was not a party to the illegality. The main arguments on this side are the following. The French Code says *L'obligation sans cause ou sur une fausse cause, ou sur une cause illicite, ne peut avoir aucun effet*. (C. C. F. 1131.)

But how is it possible to say that if a man is allowed to keep what he has got in virtue of an unlawful contract we are not giving an important effect to the contract? If the French legislator had meant to preserve the rule of the Roman law, would he not have said in this place that repetition was to be excluded in all cases where the plaintiff had to allege his own turpitude?

But in fact the maxim *nemo auditur turpitudinem suam allegans* is nowhere found in the French Code, and we have no right to introduce it. Further, the articles in the French Code 1235 and 1376 lay down as a general rule *tout paiement suppose une dette; ce qui a été payé sans être dû est sujet à répétition*.

The French Code itself makes two exceptions, viz., (1) a payment in voluntary discharge of a natural obligation (C. C. F. 1235); and (2) a payment of a bet. (C. C. F. 1967.) These are the only exceptions. (Baudry-Lacantinerie et Barde, 1, n. 316; Planiol, 2, n. 845; *Pand. Franç. Oblig.* n. 7855; Char-

mont. in *Rev. Crit.* 1899, p. 75; Olivier, *Sanction des Obligations Illicites*. See Perreau, E. H., in *Rev. Trim.* 1913, p. 553; Cobendy, G., in *Rev. Trim.* 1914, p. 46.)

On the other hand, the Swiss Code of Obligations has adopted the opposite view that there can be no repetition in any case (art. 66), *Il n'y a pas lieu à répétition de ce qui a été donné en vue d'atteindre un but illicite ou contraire aux mœurs*.

The most recent Egyptian jurisprudence, both in the Native and the Mixed Courts, is in the same sense.

The Native Court of Appeal thus states the rule: "When the Court finds that a contract is void on the ground that its cause is illegal, it will not give any further assistance to either of the parties but will leave matters as they are; thus it will not order performance of any part of the contract which remains unperformed, nor restitution of what has been delivered in pursuance of the contract. Where, therefore, the contract which has been found to be void is for the sale of land, and part only of the property sold has been delivered, the part delivered remains with the purchaser and the rest is retained by the vendor." (C. A. 18 avril 1911, O. B. XII, n. 85.)

And the head-note of a case decided by the Mixed Court in 1888 is *Les obligations fondées sur une cause illicite ne peuvent produire aucun effet entre les parties*.

Elles ne peuvent même pas servir de base à une demande en répétition des sommes indûment payées en vertu de la convention elle-même. (C. A. Alex. 14 mars 1888, R. O. XIII, 115.)

So when usurious interest has been paid the court will not order repetition of it if the account between lender and borrower has been definitely closed. (C. A. Alex. 17 déc. 1902, B. L. J. XV, 62.)

On the other hand, in an earlier case in the Native Court, the Tribunal of Cairo ordered the return of sums paid to persons for the purpose of corrupting officials in order that the payer might obtain a decoration and thus expressed the principle:—

La loi veut que la convention basée sur une cause illicite ne produise aucun effet. Si donc pareille convention a reçu exécution en tout ou en partie, le juge doit ordonner les restitutions nécessaires pour remettre les choses en leur état antérieur, et pour qu'il ne reste aucune trace de la convention dont la loi prononce la nullité. (Trib. Cairo, 5 juin 1901, O. B. III, n. 85.)

French jurisprudence.

The French jurisprudence upon the subject has been very contradictory, and in an excellent analysis of it given in a note to Sirey, M. Ed. Meynial says: *La sanction qu'il convient de donner aux obligations immorales ou illicites est un des points les plus incertains de notre droit.* (Note to Caen, 18 janv. 1888, S. 90. 2. 97. See Pau, 30 juill. 1913, D. 1914. 2. 119.)

Many French writers contend that besides the argument based upon the code there are strong reasons in favour of allowing repetition. They say that society is interested in securing that persons who stipulate a reward for doing an act which is unlawful or immoral should know beforehand not only that they will have no right of action to compel the payment but that even if they have been paid they cannot rely upon keeping what they have got.

The best way to prevent the formation of unlawful contracts is to allow repetition in all cases. Why should the action for repetition be excluded on account of the turpitude of the plaintiff when at the same time if the obligation has not been executed and an action is brought for its execution we allow the defendant, in spite of his own turpitude, to plead the exception that the contract is illegal?

As Demolombe says, what can better suit the man who has been paid for performing an immoral act than to be able when he is sued to raise his hands in horror and say the agreement was immoral, while at the same time he keeps the money in his pocket? (31, n. 437, III, and see authorities in *Pand. Franç. Oblig.* n. 7855.)

But these arguments have not altogether prevailed with the French courts. It has seemed to the courts that there were cases in which to allow repetition would be to encourage immorality, and in such cases repetition has been refused.

According to the French jurisprudence at the present moment, the court has the discretion to allow the repetition when that is the best way to fight against illegal agreements. But the court can, on the other hand, refuse the repetition when that course appears to be more in the public interest.

In other words, the court has to consider in each case whether the kind of illegal contract under consideration will be more effectually discouraged by allowing or by refusing repetition.

(Rev. Trim. 1911, p. 453 and p. 248; Rev. Trim. 1912, p. 979; Rev. Trim. 1913, p. 417.)

The Court of Cassation does not take up the position that the maxim *nemo auditur propriam turpitudinem allegans* forms part of the French law. But the Court conceives that it has power to refuse repetition, not because of the turpitude of the plaintiff, but because to allow repetition would be to encourage contracts of that kind.

There are, in particular, three classes of contracts in which the Court of Cassation has refused to order repetition:—

(1) Contracts of the lease of a house to be occupied for purposes of prostitution; loans of money to enable the borrower to buy or rent a house to be occupied for prostitution, and the like. (See the jurisprudence in Req. 1er janv. 1895, S. 96. 1. 289.) If the lessee of a brothel knows that he cannot be compelled to pay his rent or to repay loans which have been made to him to enable him to carry on his business, is this not an encouragement of the immorality?

Nothing can better please the keeper of such houses than to live rent free. The question for the court to decide is simply this. Is it more in the public interest that a landlord who has been paid his rent should know that it is liable to be taken from him again, or, on the other hand, that the tenant should know that when he has paid his rent he cannot recover it? There is, no doubt, much to be said on both sides of this question. The Court of Cassation is of opinion that the best policy, in such cases, is to refuse repetition.

(2) Money paid to a concubine. It does not seem doubtful that to allow repetition in this case is against public policy. To allow a man who has lived with a woman upon this footing to recover by an action the money which he has paid to her would be shocking to the moral sense. (Paris, 1er août 1903, D. 1904, 2, 345.)

(3) Payments made to bribe officials. In a recent case the facts were these. A company had paid sums of money to officials of a foreign government for the purpose of obtaining orders from this government.

The orders did not come, and the company brought an action for repetition of the money paid. The *Chambre des Requêtes* refused to allow the repetition. (Req. 15 mars 1911, D. 1911, 1, 382; Rev. Trim. 1911, p. 453.) Here also the decision seems to be justified on grounds of public policy. What could be more

advantageous to persons who wanted to offer bribes than to know that if the bribes did not produce the desired effect the money could be recovered? The briber would stand to win in either event. As far as the public policy is concerned the decision of the *Chambre des Requêtes* seems preferable to that of the *Tribunal du Caire* in the case cited above. That was a case in which money had been paid for the purpose of bribing officials in order to obtain decorations and the court ordered repetition. As has been already stated, the more recent Egyptian jurisprudence is in the opposite sense. (Trib. Caire, 5 juin 1901, O. B. III, n. 85.)

Summary of French law.

The fact is that the principle so admirably stated by Demolombe has not convinced the French Courts that in all cases public policy requires that repetition should be ordered. The passage in Demolombe is as follows:—*Il n'est pas, suivant nous, plus exact de reprocher à notre doctrine, de ne pas frapper assez énergiquement les pactes honteux, et de les rendre ainsi plus fréquents.*

Nous croyons au contraire, qu'elle est bien plus préventive que celle qui laisse la chose que l'un a payée, dans les mains de l'autre, qui l'a reçue.

Laisser la chose payée entre les mains de celui, qui l'a reçue, mais en vérité c'est un encouragement pour lui; c'est une prime.

S'il en est ainsi, il se fera payer d'avance; il traitera au comptant. Et puis, soit qu'il ait commis la mauvaise action, dont ce paiement était le prix, soit qu'il ne l'ait pas commise, il s'éciera pudiquement que ce paiement avait une cause immorale . . . et il gardera l'argent. N'est-il pas plus moral en même temps que plus politique, de tout anéantir absolument, de manière à ce qu'il ne reste rien de cette obligation illicite, et que celui qui recerrait, demeurant sous la menace d'une action en répétition, sache bien, dès le premier moment, que rien de stable ne peut sortir d'une cause contraire à l'ordre public. (Demolombe, 31, n. 437—III.)

No doubt the question as to what is the true public policy in such cases is extremely difficult, or we should not find two of the most recent codes, namely, the German and the Swiss Codes, diametrically opposed about it. Another solution which is adopted by the Portuguese Code is perhaps the most satisfactory. This is that when there is turpitude on both sides, the money which has been paid cannot be repeated by the plaintiff, but it is appropriated by the fisc and applied to purposes of public charity (arts. 671,

692. See the note to the official French translation of the German Code, vol. II, p. 378.

Quebec law.

It is worth noting that in the law of the province of Quebec a change of view has taken place analogous to that in France. According to a recent leading case, repetition of what has been paid is to be allowed, though it was suggested by one of the judges that there might be cases "where the sense of justice would be so shocked as to close its eyes and ears and turn the rascals out of the court the moment the true character of the suit is revealed, for example, a demand to recover money paid to commit murder or other atrocious crimes." (*Consumers' Cordage Co. v. Connolly*, 1901, 31 Can. Supreme Court Reports, 244.) No reservation of this kind was made by the other judges. The Canadian Court seems to lay down as an absolute rule that repetition is to be allowed in all cases, but this is certainly contrary to the French jurisprudence.

CHAPTER VI.

THINGS NATURAL OR ACCIDENTAL IN CONTRACTS.

(1) Things essential.

POTHIER, following earlier writers, distinguishes in a contract between those things which are of its essence, those things which are natural to it, and those things which are accidental. (*Oblig.* nos. 5—8.) For instance, there cannot be a sale without a thing sold, or without a price in money. The thing sold may be future, or speculative, as in the sale of a future crop, or of a lottery ticket, where such sales are allowed, for here the parties know they are taking a risk. But as we have seen, the sale of a thing which, unknown to the parties, does not exist is null for want of an object. (C. C. F. 1601; *supra*, p. 67.)

And if there is not a price in money the contract will not be sale; it will be exchange or some other contract. In every sale there must be the three essentials, *consensus, res, pretium*. (B.-L. et Saignat, *Vente*, n. 17.) So, likewise, we have seen that in the real contracts the delivery of the thing is essential. The pledgee, for example, has no privilege unless the object is in his hands. (*Supra*, p. 103.)

So, it is of the essence of the contract of deposit that it should be gratuitous, and that the contract should be to return the identical thing deposited. (C. C. E. 482/590; C. C. E. 487/595; C. C. F. 1917; C. C. F. 1932; C. C. Q. 1804.) If a remuneration were stipulated for, the contract would be the lease and hire of services. If another thing were to be given back it would be an exchange or a loan, according to its terms.

For deposit, as we have seen, delivery is also essential. A contract which does not possess both of these essential features cannot be deposit, though it may be called by that name in ordinary language. So what is commonly called a deposit with a bank is not really a deposit for it does not possess either of the two essential features of that contract: (1) It is not gratuitous, seeing that the bank makes use of the money of the customer; and (2) the bank is not expected to return the identical coins or

notes. This contract is really a contract of loan for consumption, or, perhaps, an innominate contract. Consequently, the rule of the contract of deposit that when the depositary is sued for return of the thing he cannot plead in compensation that the depositor owes a debt to him, does not apply to the deposit of money with a bank by a customer. (Trib. Civ. de Nîmes, 21 déc. 1899, and Trib. Civ. de la Seine, 7 nov. 1900, D. 1901. 2. 441; note to D. 98. 1. 433; D. N. C. C. art. 1915, n. 46; *Favier v. Kent*, 1902, R. J. Q. 11 K. B. 373.)

And the contract by which a bank, or a safe-deposit company, places a strong box at the disposal of a customer for a remuneration that he may keep securities or other valuables in it is not a deposit of the valuables placed in the box, for (1) it is not gratuitous; and (2) there is no delivery. The valuables which are in the box are not delivered to the bank, and the contract is equally binding though the customer never puts anything into the box. The contract is the lease of the box by the bank.

(Trib. Civ. Nîmes, 21 déc. 1899, D. 1901. 2. 441; Montpellier, 19 mars 1901, D. 1902. 2. 25; Paris, 1er janvier 1903, D. 1903. 2. 272. See *Revue Générale de Droit*, 1905, p. 140; D. N. C. C. art. 1709, nos. 165 *seq.*; *contra*, Trib. Civ. Milan, 22 janv. 1905, D. 1906. 2. 65.)

One practical consequence of distinguishing this from a case of deposit is that the valuables in the box cannot be seized by a *saisie-arrêt* or arrestment. This form of execution implies that the property belonging to the debtor is in the possession of a third party. (See C. C. C. P. 410/471.)

But, here, the property remains in the possession of the debtor who has hired the box and has the key of it. (See Cass. 12 nov. 1906, D. 1907. 1. 409; *Revue Générale*, 27, p. 420. Cf. Cass. 11 juill. 1860, D. 60. 1. 305.) The essentials of most of the named contracts are given in the codes.

(2) Things natural but not essential.

As examples the following may be given. When a thing is sold on trial it is natural that the property should not pass until the buyer has declared himself satisfied. (C. C. E. 242/308; C. C. F. 1588; C. C. Q. 1475.) But there is nothing to prevent an agreement by which the property is to pass at once, but the seller must take the thing back if the buyer so desires after he has made trial of the thing. In other words, the sale may be

subject to a resolute instead of to a suspensive condition. So, it is natural in a contract of sale that the seller should warrant the thing sold, but it may be agreed that the sale should be without warranty.

So, in the lease of a house, it is natural under the Egyptian Code that repairs should be made by the lessee only, even if the repairs are of the kind which the French law calls *les grosses réparations*. (C. C. E. 370/453; C. A. Alex. 24 juin 1908, B. L. J. XX, 293; *contra*, in France, C. C. E. 1719, 1720, 1754, 1755.) And, in general, parties are presumed to contract with reference to the known usages of a trade or of a locality.

These are among the *naturalia* of the contract.

But it is open to the parties to exclude the usage either by express terms or by framing their contract so as to be repugnant to its operation.

(3) Things accidental to a contract.

These are those clauses which are neither essential nor presumed by law, but which may be adjoined to the contract by the stipulations of the parties. For instance, the debtor may be allowed a term for payment, or may have the choice of paying the debt to the creditor or to some other person on his behalf. It is useless to give many examples. So long as the parties keep within the rule that their contract must not be against public policy they may make what stipulations they please. (Pothier, *Oblig.* n. 8; B.-L. et Barde, 1, n. 25.)

CHAPTER VII.

THE FORMATION OF CONTRACT.

For a contract there must be an agreement between the two parties and this agreement must appear from their declarations.

It is not enough that they mean the same thing; they must say so or declare their intention in some way. And it is to the declarations of the parties that the law looks in order to discover their intention. If a man declares his will to be bound by a contract he is bound by his declaration. He cannot be allowed to say, "I did not mean to carry out my promise, and therefore my declaration did not express my real will." (See German Code, art. 116; C. A. Alex. 20 févr. 1896, B. L. J. VIII. 132.) Moreover the parties must intend the agreement to affect their legal relations. It must not be such an agreement as, for example, to play a game together. For, here the parties do not intend their agreement to be legally enforceable. (See *supra*, p. 82.)

Offer and acceptance.

Every contract can be analysed into two parts, an offer and an acceptance. Either or both of them may be implied. For instance, a tramway company by running its cars makes an offer to the public to carry them at the ordinary rate, and the man who gets into the car or even puts his foot on the step accepts this offer. Bruxelles, 19 nov. 1900, D. 1902. 2. 356; Demolombe, 24. n. 56; Aubry et Rau, 5th ed. 4, p. 483; D. N. C. C. art. 1109, nos. 200 *seq.* Cf. Pollock, *Contracts*, 8th ed. p. 12.)

Contract may be *inter presentes* or *inter absentes*.

The interchange of consent between the parties to a contract may be between two parties who meet each other in the same place and communicate directly. In this case, there is no appreciable interval of time between the declaration of the acceptance and the offeror's knowledge of this declaration. The two things are, for practical purposes, simultaneous. And, in contracts of this

class, unless the offer is accepted at once, it falls to the ground unless the parties have fixed a delay. (See Swiss Code of Oblig. art. 4; German Code, art. 147; Morocco Code of Oblig. art. 23.)

But, on the other hand, the parties may be in different places, so that it takes some time for them to communicate with each other. Their declarations of will must be conveyed by some means of communication such as a messenger, or a letter or a telegram. Contracts formed in this way between parties at a distance are called contracts by correspondence.

These contracts differ from contracts between present parties in two important respects: (1) The party who makes the offer does not know at once whether it is accepted or not; (2) there is a difficulty in determining where the contract is made. Is it made at the place where the offer is received or at the place where the acceptance is declared, or at the place where the offeror receives the information that his offer has been accepted? The various theories on this subject will be referred to later.

Further, contracts made by telephone are to be assimilated for some purposes to contracts made *inter presentes*, and for other purposes to contracts *inter absentes*. It will be convenient to postpone discussing these contracts until after we have explained the theories as to the time and place of the completion of contracts in general.

The offer.

The offer must be made with a view to acceptance; that is, it must be a final proposal. An offer of this kind must be distinguished from a mere offer to negotiate. (See C. A. Alex. 2 mars 1904. B. L. J. XVI, 147.)

The man who puts *appartement à louer* on his house is not obliged to let it to the first person who agrees to pay the rent. The offer is merely an offer to negotiate. But the shopkeeper who puts a ticket on goods stating the price is bound to sell them at that price. (B.-L. et Barde, I, n. 30; B.-L. et Saignat, *Vente*, n. 46.)

Offer to the public.

An offer may be made to the public or to a group of persons, as in the case of goods in a shop-window marked at a certain price, or of the advertisement of a reward to anyone who discovers a fugitive from justice or finds a lost article.

If any person offers the price marked on the goods, or, knowing of the offered reward, discovers the fugitive, or finds and returns the lost article, he thereby accepts the offer. (B.-L. et Barde, *ut sup.*: Lyon-Caen et Renault, *Traité de Droit Commercial*, 3rd ed. 3, n. 22; Trib. Comm. Seine, 5 janv. 1869, D. 69. 3. 14; D. N. C. C. art. 1109. nos. 187 *seq.* For same rule in England, see *Carlill v. Carbolic Smoke Ball Co.*, 1893, 1 Q. B. 256, 62 L. J. Q. B. 257.)

Revocation of offer and acceptance in ignorance of revocation of offer.

Until an offer has been accepted it does not bind the offeror.

He can withdraw it or revoke it. But, according to the French law, if he has fixed a delay during which the offer is to remain open he cannot revoke the offer during the delay. This point will be considered later. The case here is when the offeree accepts the offer not knowing that a revocation of this offer is on its way to him. Suppose A, in Cairo, orders goods from B, in London, by a letter written on the 6th November. On November 8th. A changes his mind and writes a second letter revoking the offer. B, the merchant in London, receives the first letter on Nov. 12th. B accepts the offer, and at once goes out into the market, buys the goods to send to Cairo, and writes saying he has done so. On Nov. 14th, he receives the revocation. Is there a contract? According to the French law, no. At the time when B accepted the offer A had changed his mind. It is impossible, accordingly, to find a moment at which the mind of A and the mind of B were in agreement and, therefore, there is no contract. But if B can show that he has suffered loss by the revocation, he can, according to many authorities, recover damages. (Pothier, *De la Vente*, n. 32; Valéry, *Contrats par Correspondance*, n. 185; Aubry et Rau, 5th ed. 4, p. 483. *Infra* pp. 259, 338.) The English law with regard to revocation as we shall see later, is different, and though less logical, is much better adapted to the requirements of business.

Justification of giving damages caused by revocation of offer in this case.

Although most French authorities support the proposition that damages are due to one who has accepted an offer not knowing of

its revocation and has incurred damages by relying on the validity of the offer, the principle upon which damages are awarded in such a case is not very clear. If there is no contract before acceptance the revocation is not a breach of contract. The liability cannot arise *ex contractu*. And if the unaccepted offer in no way binds the offeror, it would seem that, in revoking it, he is exercising a faculty which belongs to him, and that he cannot, accordingly, be liable *ex delicto*. Ihering suggested that this was a special kind of fault for which he invented the name *culpa in contrahendo*. (*Gesammelte Aufsätze*, I, p. 327, in French trans. *Œuvres Choiesies*, 2, p. 1.) The theory of Ihering will be noticed more fully in explaining the subject of annulation of contracts. (*Infra*, p. 338.)

It has been maintained that there is here an implied guarantee on the part of the offeror to make good the loss caused in this way. But the leading advocates of this opinion, especially Windscheid, have abandoned it themselves. It is unreasonable to imply any such restriction of the offeror's freedom. Why should we suppose he intended to surrender his rights for nothing? If there were a text in the code saying that such a clause was to be implied this would be another matter. Without any such text it is unsound to say that this was the intention of the offeror. The fallacy is the same here as it is in the theory that an employer is presumed in the contract of employment to guarantee the safety of his workman. In both cases we are asked to assume in the face of probability that the party to the contract gave a silent consent to something which was against his interest. (See Windscheid, *Pandekten*, 8th ed. 2, s. 307, note 5; B.-L. et Barde, *Oblig.* 1, n. 362; Brock, W., *Das Negative Vertragsinteresse*, p. 151; *infra*, p. 338.)

The better opinion is that there is not in the French law any basis for such liability when the offeror has acted in good faith and there has been no negligence on his part. But the facilities of communication by telegraph or otherwise, make it easy for the offeror to inform the offeree promptly of the revocation. If he does not avail himself of this opportunity, this will, generally, amount to negligence. (B.-L. et Barde, 1, n. 32; Laurent, 15, n. 481. Cf. Bordeaux, 17 janv. 1870, D. 71. 2. 96.)

Nor does it appear to be correct to say with M. Valéry that in commercial matters, at any rate, there is a usage of trade which forbids revocation except subject to damages. Business, according to M. Valéry, could hardly be carried on by correspondence if no one knew that he could rely on the stability of an offer made to him. The offeror who makes no special terms on the matter

must be taken to guarantee that if he revokes his offer in a way to cause damage to the other, he will make good the loss. (Valéry, *Contrats par Correspondance*, n. 187.)

An Italian writer, M. Gabriele Faggella, would go further.

Even before a definite offer has been made, the two parties may have been in negotiation. In complicated transactions there are many stages. The parties may have got into communication and may be making enquiries, preparing estimates, and so on. During this stage, if one of them goes to expense, and the other party acquiesces in this, the latter must, according to this writer, repay these expenses if he breaks off the negotiations arbitrarily. The second stage is when the main lines of agreement have been arrived at, but no distinct offer has been made. At this stage the parties are no longer at arm's-length.

By the fact of their having carried on such negotiations they are already bound to act towards each other with good faith, and to break off relations, without a valid reason arising out of the negotiations themselves, would be a breach of faith, and would involve liability in damages, and, in this case, the damages will include not only actual expenses, but also loss suffered by missing other opportunities of business. The third stage is when there has been a definite offer. At this stage revocation, whether justified or not, will be a ground of damages.

This extreme view must certainly be rejected. It would be impossible in practice to decide whether a withdrawal at one of the earlier stages was arbitrary, and so far from encouraging commerce, this would be impeded by such a development of the law.

Business men would be unwilling to enter into negotiations which might expose them to liability before they meant to commit themselves. (See R. Saleilles, in *Rev. Trim.* 1907, p. 697.) Ihering made the duty to take care begin when the offer had been accepted. (*Gesammelte Aufsätze*, 1, p. 364.)

Damages for inducing party to enter into void contract.

In my view the offeror has an absolute right to revoke his offer if he does so without causing damage by negligence. But this does not imply that if a party offers to make a contract which he knows to be void or voidable he has no responsibility. This question will be discussed elsewhere. (*Infra*, pp. 338 *seq.* See B.-L. 41 Barde, 1, n. 362.)

English law as to revocation of offer.

In the English law an offer can always be revoked before acceptance. Further, an undertaking to keep an offer open, that is, to allow a delay for acceptance, is not binding upon the offeror unless it is made by a deed under seal, or unless the offeree has given some valuable "consideration" for such a delay. (*Dickinson v. Dodds*, 1876, 2 Ch. D. 463, 45 L. J. Ch. 777; Pollock, *Contracts*, 8th ed. p. 27; Anson, *Contracts*, 14th ed. p. 45. For the meaning of "consideration," see *supra*, p. 63.)

Revocation of the offer does not give the offeree any claim to damages. But this rule does not, in the English law, lead to hardship, because of another rule of that law that revocation of an offer is not operative until the offeree knows of it.

Under the English law, if the offeree accepts the offer before he knows that the offeror has revoked it, the contract is complete, though a revocation may be on its way to him. It is difficult to reconcile this with principle, but it is, undoubtedly, recommended by convenience. The offeree, when he accepts, can act at once, knowing that he has a binding contract. It would be extremely inconvenient if he had to wait for such a time as to be sure that a letter revoking the offer had not been posted. And there is the risk that the revocation posted never reaches him. This risk may be a very serious one, for example, if mail-boats are exposed to submarine attack during war. (*Byrne v. Van Tienhoven*, 1880, 5 C. P. D. 344, 49 L. J. C. P. 316; *Henthorn v. Fraser*, 1892, 2 Ch. 27, 61 L. J. Ch. 373; Pollock, *Contracts*, 8th ed. p. 31; Anson, *Contracts*, 14th ed. p. 42.)

This being the principle settled by authority in England, the revocation of the offer cannot easily cause damage to the offeree as it may well do in the French law.

Undertaking to keep offer open.

If A in making an offer says to B "this offer is to hold good for a week," the effect of this declaration, according to the French law, is that A cannot revoke his offer during the delay. This is explained by saying that the offeree may be presumed to accept this opportunity of considering the offer as this is entirely for his benefit, and does not commit him to anything. (*Aubry et Rau*, 5th ed. 4, p. 481; Valéry, *Contrats par Correspondance*, n. 174. 1; Req. 27 juin 1894. S. 98. 1. 434, D. 94. 1. 432.)

Rule expressed in some legislations that offer implies grant of delay for acceptance.

In some modern codes the rule is laid down that every offer contains by implication the offer to keep it open for some short period during which the offeror cannot revoke his offer.

The German and the Swiss Codes adopt the new doctrine that an offer is in itself binding as a unilateral declaration of will.

Celui qui propose à un autre de conclure un contrat est lié à l'offre, à moins qu'il ait exclu ce lien obligatoire. (German Code, art. 145.)

And the Swiss Code of Obligation provides: *Lorsque l'offre a été faite sans fixation de délai à une personne non présente, l'auteur de l'offre reste lié jusqu'au moment où il peut s'attendre à l'arrivée d'une réponse expédiée à temps et régulièrement.*

Il a le droit d'admettre que l'offre a été reçue à temps.

Si l'acceptation expédiée à temps parvient tardivement à l'auteur de l'offre et que celui-ci entende ne pas être lié, il doit en informer immédiatement l'acceptant (art. 5. Cf. arts. 6 and 7; German Code, art. 145; Civ. Code Louisiana, arts. 1800 seq.; Code Port. art. 652; Code Maroc. *Oblig.* art. 30).

In French law grant of delay cannot be implied in civil matters but may be implied in commercial matters.

In France there is no legislation to this effect, and, according to the French law, there is no implied undertaking in civil contracts that an offer is to stand open for a reasonable time. (Valéry, *Contrats par Correspondance*, n. 172; Aubry et Rau, 5th ed. 4, p. 481; Laurent, 15, n. 476; Riom, 2 déc. 1883, D. 85. 2. 101; *Conseil d'Etat*, 1er juin 1883, D. 85. 3. 5.) But in commercial matters a contrary solution is generally admitted. It is held that according to the accepted usages of trade with reference to which the offeror makes his offer he must be presumed to have intended it to remain open long enough to enable the offeree to examine it and to reply to it. (Demolombe, 24, n. 67; Lyon-Caen et Renault, *Traité de Droit Commercial*, 3, n. 15; Bordeaux, 17 janvier 1870, D. 71. 2. 96.)

Lapse of the offer by delay in commercial cases.

The offer may state that it is to be open only for a certain time, but when no time is stated the law presumes in commercial matters that the offer is only to remain open for a reasonable time.

Dans les offres d'achat ou de vente faites par correspondance, l'acceptation ne lie l'offrant qu'autant qu'elle a été faite dans le délai moral nécessaire, eu égard à la nature du marché, pour examiner l'offre et y répondre. (Req. 10 mai 1870, D. 71. 1. 61; Req. 27 juin 1894, D. 94. 1. 432.)

Sometimes the form of the offer shows that it is only to remain open for a short time.

An offer made by telegram must generally be accepted by telegram.

And if an offer is made by letter, and an answer by telegram is requested, an acceptance will be in general too late unless a telegram is despatched on the day when the order is received. (Valéry, *Contrats par Correspondance*, n. 192.) In some businesses, by trade usage, a particularly prompt acceptance is expected. For example, in the sale of a vintage, an offer to sell the crop must, according to trade usage in some localities, be accepted within 24 hours. (Bordeaux. 29 janv. 1892, D. 92. 2. 390.)

Lapse of offer by delay in civil cases.

Is the rule different in civil cases?

In civil matters there is not always the same necessity for rapid action as exists in business transactions between traders. When the offer is not of a commercial kind it may be that the offeror does not expect a prompt reply. He may be willing to leave to the offeree ample time for the consideration of the offer. But is it reasonable to say that the offeror intends his offer to remain open indefinitely? If I offer to sell you my house for 2,000 pounds and I do not fix any delay, and you take no notice of my offer for ten years, and, after that long interval, you write to accept my offer, should I be bound by this?

According to many French writers when no delay is fixed by the offeror the offer can be accepted at any time unless it has lapsed owing to a loss of capacity in the manner described in the next paragraph. *Tant que l'offre n'a pas été rétractée, il*

peut être acceptée. (Baudry-Lacantinerie et Saignat, *Vente*, n. 27; Aubry et Rau, 5th ed. 4, p. 482.)

Or, as M. Planiol expresses it: *En principe, l'offre dure indéfiniment jusqu'à ce qu'elle soit retirée.* (Planiol, 2, n. 977.)

The Mixed Court of Appeal has recently formulated the rule in the same sense:

L'offre—en l'espèce une offre d'achat d'immeuble—ne cesse de subsister que lorsqu'elle est retirée par son auteur, à moins qu'il n'ait été convenu d'un délai passé lequel l'offre ne subsisterait plus. (C. A. Alex. 27 nov. 1917, B. L. J. XXX, 62.)

But are we driven to a conclusion so contrary to the presumed intention of the offeror? The offer is merely an expression of the offeror's will, and there is no reason why it should continue open for a longer time than he may be presumed to have intended. The man who makes an offer wants to get an answer within a reasonable time and does not intend to remain bound by his offer indefinitely. If he has not fixed any delay for acceptance it is for the court to fix according to circumstances what is the *délai moral* which he may be presumed to have intended to allow.

According to the better opinion the general principle of the law is that the offeror is not to be bound indefinitely but only for a reasonable time. And the French jurisprudence does not indicate that the rule should be different in civil cases from what it is in commercial matters. (See Req. 27 juin 1894, D. 94, 1. 432; Valéry, *Contrats par Correspondance*, n. 190; D. N. C. C. art. 1109, n. 89.)

Comparison with other laws.

The English law and the modern codes agree with the view just stated.

In England it is settled law that if the parties have not fixed the time during which the offer is to remain open, it is left for the court to say what is a reasonable time within which the offer may be accepted. The following case is a good illustration:

Montefiore offered by letter dated the 28th of June to purchase shares in a company. No answer was made to him until the 23rd of November when he was informed that the shares were allotted to him. He refused to accept them, and it was held that his offer had lapsed by reason of the delay of the company in notifying their acceptance. (*Ramsgate Hotel Co. v. Montefiore*, 1866, L. R. 1 Exch. 109, 35 L. J. Ex. 90.)

A man who applies for shares in a company cannot be expected to wait indefinitely to know if the shares are allotted to him. If he does not get these shares he, probably, has another use for his money. (See Anson on *Contracts*, 14th ed. p. 39.)

The German Code says:

L'offre s'éteint lorsqu'elle est rejetée envers l'auteur de l'offre ou qu'elle n'est pas acceptée envers lui en temps utile.

L'offre faite à une personne présente ne peut être acceptée qu'immédiatement. Il en est de même d'une offre faite de personne à personne au moyen du téléphone. L'offre faite à une personne absente ne peut être acceptée que jusqu'au moment où l'auteur de l'offre avait, dans les conditions ordinaires, à attendre l'arrivée de la réponse (art. 146, 147).

The Swiss Code says:

Lorsque l'offre a été faite sans fixation de délai à une personne non présente, l'auteur de l'offre reste lié jusqu'au moment où il peut s'attendre à l'arrivée d'une réponse expédiée à temps et régulièrement.

Il a le droit d'admettre que l'offre a été reçue à temps. (Code Oblig. art. 5.)

The Morocco Code of Obligations says:

Celui qui fait une offre par correspondance, sans fixer un délai, est engagé jusqu'au moment où une réponse, expédiée dans un délai moral raisonnable, devrait lui parvenir régulièrement, si le contraire ne résulte expressément de la proposition. Si la déclaration d'acceptation a été expédiée à temps, mais ne parvient au proposant qu'après l'expiration du délai suffisant pour qu'elle puisse parvenir régulièrement, le proposant n'est pas engagé, sauf le recours de la partie en dommages-intérêts contre qui de droit. (Code Oblig. art. 30.)

The second *alinéa* of this article is a reasonable modification of the theory that the contract is complete when there is a declaration of acceptance, a theory which will be explained presently.

It is logical to hold that if the offeror contemplates an acceptance by letter he takes the risk of the letter being lost in the post. and in the English law it is settled that if the letter of acceptance is posted the offeror is bound although the letter never reaches him. (*Household Fire Insurance Co. v. Grant*, 1879, 4 Ex. D. 216, 48 L. J. Ex. 577.)

But the solution of the Morocco Code is not inequitable.

Lapse of offer by loss of capacity.

If the offeror dies or becomes insane before the offer is accepted the offer lapses, because he has no longer the power to give consent at the moment when the other party is prepared to agree. And if the offeree dies before the acceptance the offer lapses, for he had no right before acceptance which he could transmit to his heirs. (Aubry et Rau, 5th ed. 4. p. 482; B.-L. et Barde, 1, n. 31.)

German Code as to lapse of offer.

The German Code adopts the principle that an offer is irrevocable during a reasonable delay or during a delay fixed by the offer.

Within this period the offer does not lapse even by the death of either party unless the contract is of a strictly personal kind. If a business man orders goods and dies before the offer is accepted there is, according to the German theory, no reason why the offer should lapse. His business is still going on, though he is no longer at the head of it, and, seeing that he wanted the goods for his business and not for himself, there is no reason why the offer which he made for his business should lapse on account of his death. But it is otherwise when the nature of the offer is plainly personal. If, for instance, a man reserves rooms for himself in an hotel, and before the offer is accepted, the offeror dies, then, even on the German theory, the offer lapses, because that is the presumed intention. (German Code, 130, 153. See Saleilles, notes to French translation of German Code, under these articles, and *Déclaration de volonté*, p. 130; Cosack, *Lehrbuch des Deutschen Rechts*, 6th ed. 1, p. 198.) Some French writers are disposed to accept this theory as part of the French law: at any rate, they maintain that an offer does not necessarily lapse by the death of the offeror. (Colin et Capitant, 2, p. 287.)

Acceptance may be tacit.

The nod of a bidder at a sale, the sending of goods ordered, the doing of work by request, getting into a tramcar, the finding and returning of a lost article for which a reward has been offered, are illustrations of tacit acceptance. Similarly, receiving a ticket or a bill of lading in which conditions are stated, generally amounts to implied acceptance of the conditions. But, in this last case, this presumption may be displaced by evidence that the party

to whom the bill of lading or the ticket was given could not read, or could not read the language in which the conditions were stated, or had not the education or the experience which would make it reasonable to assume that he assented to the conditions. (See Code Maroc. *Oblig.* 15, 25, 26. Cf. Dig. 14. 3. 11. 3.) When the conditions are not mentioned in the contract itself but were contained in a prospectus or advertisement there is no presumption that they were agreed to. The acceptor must be shown to have accepted in the knowledge of these conditions and to have agreed to them. (*D. Supp. Obligations*, n. 30; Trib. Com. Boulogne, 6 févr. 1866, D. 68. 1. 500. Cf. Nîmes, 27 déc. 1880, D. 81. 2. 132.)

English law as to this.

In the English law, conditions printed on a passenger's ticket are not binding on the passenger unless he has received notice of them. Whether or not he has received such notice, that is to say, whether he has had his attention duly drawn to the conditions, is a question of fact which, under the English system, is left for the decision of a jury. (*Richardson, Spence & Co. v. Rowntree*, 1894, A. C. 217, 63 L. J. Q. B. 283.) According to the English cases, which are numerous, the question is not whether the carrier gave such notice as ought to have been enough for a person of normal intelligence, but whether the notice ought to have been enough for this particular passenger in the circumstances of the case. (See *Cooke v. Wilson, Sons & Co. Ltd.*, 1916, 85 L. J. K. B. 888; Pollock, *Contracts*, 8th ed. p. 52, 3rd Amer. ed. p. 53; and English and American cases there cited.)

May acceptance be inferred from silence?

As a general rule, not. Silence not accompanied by any other facts to give it significance can hardly be considered as acceptance. But when accompanied by other circumstances, such as taking possession of a thing sold, it may easily be held to indicate acceptance. (Req. 18 oct. 1909, D. 1910. 1. 207. Cf. Rouen, 19 mars 1902, D. 1903. 2. 109.) The mere fact that the offeree takes no notice of the offer generally means that he does not think it worth considering.

He may throw it into the waste-paper basket. Even when samples are sent he does not need to return them. According to

French cases, if a newspaper prints on its sheet, *l'abonnement continue sauf avis contraire*, this does not make a subscriber liable to a new subscription if he continues to receive the newspaper after his subscription has expired. (Douai, 10 mars 1874, D. 74. 2. 153.)

The contract for the supply of the newspaper is for a limited period, and if the editor continues to send it when this period has expired he does so at his own risk. (Valéry, *Contrats par Correspondance*, n. 236.)

But there are cases in which silence may imply consent. It is a question for the courts whether this is a fair inference in the particular circumstances. Acceptance may in certain cases be inferred if the offeree receives the offer and makes no reply.

Some rules may be formulated:

1. When the offer is entirely to the advantage of the offeree and he has no motive, pecuniary or moral, to lead him to refuse it. Thus in most cases where a creditor releases his debtor, or a party renounces a prescription acquired in his favour, there is a strong presumption that the other party accepts if he makes no protest. (B.-L. et Barde, 1, n. 45.)

But there is no such presumption of acceptance in the case of gifts, for there may be many reasons why it is not expedient to accept a gift. (C. C. E. 48/70; C. C. F. 932; B.-L. et Colin, *Donations et Testaments*, 1, n. 1122.)

(2) When there has been a course of dealing between the parties which makes it reasonable for the offeror to assume that silence on the part of the offeree means consent. For instance, I have been in the habit of ordering coal from a certain dealer. I write asking him to send me a certain quantity of coal at Christmas at the market price. If he does not reply I am entitled to assume his consent. (*Pand. Franç. Oblig.* n. 7071; Valéry, *op. cit.* n. 94; Trib. Com. de Nantes, 19 mai 1906, D. 1908. 2. 313, and note by M. Valéry on p. 314.)

The Morocco Code says: *L'absence de réponse vaut aussi consentement lorsque la proposition se rapporte à des relations d'affaires déjà entamées entre les parties.* (*Oblig.* art. 25.)

Upon this principle, when there is a contract formed between the parties and, before the commencement of its execution, one of them intimates to the other that he desires the resiliation of the contract, the silence of the other may lead the court to infer that he accepted this proposal. A, in Egypt, ordered several thousand tons of coal from B in England. Before the coal was

despatched war broke out. B intimated that, owing to orders of the British Government forbidding the exportation of coal, he could not execute the contract. A made no reply to this intimation but some months later made a formal demand for delivery, and then brought an action of damages. It was held that *écartant la question de force majeure, il est néanmoins constant que si par son silence un acheteur induit son contractant en erreur en lui laissant croire que lui, l'acheteur, est d'accord avec son vendeur à considérer le contrat comme résilié, l'acheteur n'aura pas plus tard le droit de soutenir le contraire.* (C. A. Alex. 11 avr. 1917, B. L. J. XXIX, 358. As to the plea of *force majeure* in such a case, see C. A. Alex. 10 mai 1916, B. L. J. XXVIII, 306, and *infra*, 2, pp. 307 *seq.*)

(3) A commission given by letter to an agent to do some business of a kind which he is in the habit of doing is presumed to be accepted if not declined. The carrying on of this kind of business is an offer to the public that he will accept such mandates. (Valéry, *Contrats par Correspondance*, n. 91.)

(4) When the offer has been provoked by the other party, as when tenders are advertised for, and it is declared that the contract shall go to the lowest tender, no further acceptance is necessary. (B.-L. et Barde, 1, n. 45.)

Most of the cases where acceptance is implied from silence will fall under one of these heads. There may be particular circumstances in which the nature of the offer and the position of the parties relative to each other may lead the court to infer that it was accepted by silence. But further than this, it will not be safe to go. We cannot say, as a general rule, that a business man who receives an offer and does not refuse it must be taken as having accepted it. (B.-L. et Barde, 1, nos. 44 *seq.* See Rev. Trim. 1915, p. 174; Req. 18 août 1909, D. 1910, 1, 207, and the note of M. Valéry to D. 1908, 2, 313.)

At what moment is the contract complete?

When the parties are present, there is no difficulty because the offeree accepts at once, and the offeror knows of this acceptance by hearing it. But when the parties are making the contract by correspondence it is important for the following reasons to decide when the contract was completed:

(1) After completion neither of the parties can revoke.

(2) The death or incapacity of either does not cause the contract to lapse.

(3) The completion of the contract may transfer the risk as in insurance, or as in sale, according to the French law, though as to sale, the Egyptian law is different. (C. C. E. 297, 371.)

(4) Upon the determination of the place where the contract was made may depend the question what court has jurisdiction. (Valéry, *op. cit.* nos. 119 *seq.*; B.-L. et Barde, I, n. 37; Rivier, A., in *Revue de droit international et de législation comparée*, 1872, p. 535; Dolbeau, *Contrats par Correspondance*, Thèse, p. 281; Windscheid, *Pandekten*, 8th ed. 2, n. 306.)

There are three theories as to the moment when the contract is complete:

(1) Declaration.

According to this theory, the contract is complete as soon as the offeree has declared his acceptance of the offer provided that the declaration is made openly in a way to indicate that he intends it to be irrevocable. The mere marking of an order as approved is not such an irrevocable declaration, nor is the writing of a letter accepting the offer, if the letter has not been posted.

But there may be such a declaration of acceptance made before witnesses, or something done by the offeree which sufficiently indicates that the offeree has accepted the offer in an irrevocable way.

Accepted by Morocco Code.

The Morocco Code accepts the theory of declaration and expresses it clearly: *Le contrat par correspondance est parfait au moment et dans le lieu où celui qui a reçu l'offre répond en l'acceptant.*

Le contrat par le moyen d'un messenger ou intermédiaire est parfait au moment et dans le lieu où celui qui a reçu l'offre répond à l'intermédiaire qu'il accepte. (Dahir sur Oblig. art. 24.)

(2) Expedition, or "système d'émission."

In most cases the natural way of showing irrevocable acceptance of an offer made by correspondence is to send a letter or telegram to that effect. And, according to the theory of expedition, the contract is not complete until the acceptance has in this way been put in a course of transmission to the offeree.

(3) Information, or "système de la réception."

According to this theory it is not enough that the acceptance has been declared or even despatched; the contract is not complete until the acceptance reaches the offeror. Until he has got this information, either party can revoke.

The theory is thus stated by one of its supporters: *En effet pour qu'un contrat se forme, il faut sans doute le concours des volontés respectives de ceux entre qui il intervient, mais il faut aussi que chacun sache la coexistence de ces volontés: on n'est pas contractant à son insu. La lettre d'offre ayant fait connaître à l'autre partie la volonté de l'offrant, la lettre d'acceptation doit faire connaître à celui-ci la volonté concordante de l'acceptant.* (B.-L. et Saignat, *Vente*, 3rd ed. n. 35.)

This theory is very inconvenient in practice because a merchant who accepts an offer, such as an order for certain goods, does so with a view to the price of the goods at that time.

If we adopt the theory of information he has to wait until his acceptance has had time to reach the offeror before he begins to execute the order. During that delay, the offeror may revoke the order by telegram, and, even if he does not, the market may have changed.

French doctrine.

In France many authorities accept the theory of declaration: *Il y a un contrat aussitôt que l'offre est agréée pourvu qu'il y ait trace de l'acceptation.*

(B.-L. et Barde, 1, n. 37; Valéry, *Contrats par Correspondance*, n. 142, and authorities there cited.)

The arguments in its favour are, in my opinion, conclusive.

(1.) The code nowhere says that the formation of the contract is postponed until the one party knows that the other party has consented. It implies throughout that there is a contract as soon as the parties have come to an agreement. (C. C. E. 128/188; C. C. F. 1101, 1108.)

(2.) Declaration is the only theory which is consistent with tacit acceptance.

If a man requests another to do work for him and the request is made by letter, then, upon the theory of information, although the offeree did the work, there would be no contract until the other had heard that he had done it. If a man sent to a creditor an object to hold as security for a debt, the contract of pledge would

not be created until the sender had heard that the creditor had received it.

(3.) Declaration is the only theory that suits the ordinary course of business. It is extremely inconvenient to make the acceptor put off the execution of the contract until he knows that his letter has reached the offeror.

(4.) If the law requires knowledge by each party of the other's state of mind it would be logical to say that the contract was not complete until the acceptor knew that the offeror had heard of his acceptance, for, until then, the acceptor might say that he did not know if the contract was formed or not, and that one cannot be bound by a contract without one's knowledge. (Mareadé, sur l'art. 1108, 4. n. 395; Valéry, *Contrats par Correspondance*, n. 166.)

French jurisprudence.

The French jurisprudence is still hesitating, and the *Cour de Cassation* holds that the question is one of fact, consequently, that it is not entitled to interfere with the judgments on this point of the Courts of Appeal. The French Courts more generally adopt the theory of declaration or expedition than that of information. (See the cases in M. Valéry's note to D. 1913. 2. 1. See, in favour of the theory of emission, Poitiers, 14 mai 1901, D. 1902. 2. 12. In favour of the theory of reception, Nîmes, 4 mars 1908, D. 1908. 2. 248, S. 1910. 2. 106; Paris, 5 févr. 1910, D. 1913. 2. 1, and note by M. Valéry; D. N. C. C. art. 1109, nos. 106 *seq.* See Valéry, *Contrats par Correspondance*, nos. 148 *seq.*; B.-L. et Saignat, *Vente*, 3rd ed. nos. 35 *seq.*; for cases and authorities.)

Egyptian jurisprudence.

In Egypt it has been held by the Native Court of Appeal in one case that, at least in civil matters, the theory of information is to be adopted, and that the contract is not formed until the acceptance has come to the knowledge of the offeror. (C. A. 26 March 1912, O. B. XIII, n. 90.) But in a later case the Mixed Court of Appeal has followed the theory of declaration: *Un contrat conclu par correspondance est censé avoir été conclu où la sollicitation a été acceptée.* (C. A. Alex. 2 déc. 1915, B. L. J. XXVIII, 43.)

The case contains no discussion of the question.

Comparison with other laws.**English law.**

It is pointed out very clearly in an American case that it is a fallacy to assume that a contract cannot be consummated unless both parties have knowledge of it at the moment when it becomes complete. This can only exist when both parties are present.

It is obviously impossible ever to perfect a contract by correspondence if the knowledge of both parties at the moment they become bound is an essential element in making out the obligation.

The case referred to was one where the plaintiff had written to an insurance company agreeing to certain terms for the insurance of his house.

He posted the letter, but before it was delivered the house was burnt down. The insurance company disputed liability but unsuccessfully. (*Tayloe v. Merchants' Fire Insurance Co.* 1850, 9 How, S. C. 390, cited in Pollock, *Contracts*, 3rd Amer. ed. p. 885.)

The English law has definitely rejected the theory of information. (*Adams v. Lindsell*, 1818, 1 B. & A. 681, 19 R. R. 415; *Henthorn v. Fraser*, 1892, 2 Ch. 27, 61 L. J. Ch. 373.)

But there must be a communication of the acceptance, and if it is made by letter or telegram, the acceptor must have put his affirmative answer in a determinate course of transmission to the proposer. (Pollock, *Contracts*, 8th ed. p. 34.)

The English law holds that in considering what kind of communication amounts to acceptance we must look at the nature and terms of the offer. There may well be an implied intimation in it that a particular mode of acceptance is expected. The man who advertises for a lost dog does not expect people to sit down and write to him accepting the offer. The man who orders certain goods at a price named thereby intimates that the offeree can accept the offer by sending the goods. But there must be proof of acceptance by some overt act or declaration on the part of the offeree in conformity with the indicated mode of acceptance. (See Anson, *Contracts*, 14th ed. p. 30.)

Swiss and German law.

Notwithstanding the reasons in favour of the theory of declaration, the theory of information is adopted by the Swiss Federal

Code of Obligations (art. 3: Rossel et Menth, *Manuel de Droit Civil Suisse*, p. 29).

The German Code makes a compromise by saying the contract is complete by the acceptance of the offer without any declaration to the offeror, when such a declaration is not according to usage, or the offeror has renounced it (art. 151).

Revocation of acceptance.

If the theory of information is adopted it follows that the acceptor can revoke his acceptance if the revocation reaches the offeror earlier than the acceptance itself or at the same time. Upon the theory of declaration the contract is binding on both parties as soon as the acceptance has been declared, and there can be no revocation afterwards. (B.-L. et Barde, I, n. 37.)

Contracts made by telephone.

When a contract is made by telephone it is a controversial question whether it ought to be classed among contracts concluded *inter presentes* or among contracts by correspondence. The parties to such a contract speak directly to each other. The offeror hears the answer made by the offeree, and knows immediately whether his offer is accepted or not. In this important respect, a contract made by telephone is not like a contract by correspondence. No difficulty arises here from there being an interval of time between the acceptance and the offeror's knowledge of the acceptance. But, on the other hand, the parties who make a contract by telephone are not necessarily in the same place. They may even be in different countries. One may telephone, for instance, from Paris to Brussels, or from Montreal to New York. And even when the parties live in the same country but in different jurisdictions, there may be the same difficulty which arises in contracts by correspondence, in deciding at what place the contract was complete. When the parties are in different countries there are the same problems of international law to be solved as would have arisen if they had written to each other instead of telephoning.

It is not, therefore, correct to say that there is no peculiarity which distinguishes contracts made by telephone from ordinary contracts between parties present, or, as it has been put, that the situation is just as if the contracting parties were in adjoining rooms and communicated with each other by an acoustic tube.

The correct conclusion appears to be that contracts made by telephone resemble contracts made *inter presentes* in certain respects and contracts *inter absentes* in certain other respects. The courts are in no way bound to be blind to the facts, and there is no rule of law which says that these contracts are to be placed exclusively in one or other of these categories. They resemble contracts *inter presentes* in the fact that there is no delay for acceptance, and, therefore, no possibility of revocation pending such delay. But they resemble contracts *inter absentes* in respect of the fact that the parties are, or at any rate may be, in different jurisdictions.

In determining the place of the contract the rule will be that this is the place where the acceptance has been declared and that the law of this place will govern the contract, unless the parties have indicated another intention, or the circumstances are such that it is unreasonable to suppose that this law was intended.

This, however, is a question of private international law. (See, on the last point, Surville, A. in *Journal du Droit International Privé*, 1910, v. 37. p. 766, and p. 1086; *infra*, p. 375. And, on contracts by telephone in general, see Valéry, *Contrats par Correspondance*, nos. 63 *seq.*; Lyon-Caen et Renault, *Traité de Droit Commercial*, 3, n. 28; B.-L. et Barde, *Oblig.* 1, n. 40; Dolbeau, *Contrats par Correspondance*, Thèse, p. 466.)

Modern codes on contracts by telephone.

The Swiss Code of Obligations says: *Les contrats conclus par téléphone sont censés faits entre présents, si les parties ou leurs mandataires ont été personnellement en communication* (art. 4).

But the position of this *alinéa* shows that all that it means is that in such contracts there is no delay for acceptance, a rule which is formulated also in the German Code (art. 147) and in the Morocco Code of Obligations (art. 23).

Proof of contracts by telephone.

There are peculiar difficulties in proving such contracts. There is no writing, and, in general, there are no witnesses. If there are witnesses they have, as a rule, heard only what was spoken by one party. The voice is so disguised by the apparatus that

personation is comparatively easy. Notwithstanding these serious disadvantages the convenience of conversation *viva voce* is so great that contracts are constantly made by telephone. The subject of proof lies outside our scope. (See Rev. Trim. 1912, p. 743; Valéry, *Contrats par Correspondance*, n. 63; Surville, A., in *Journal du Droit International Privé*, 1910, v. 37, p. 780.)

CHAPTER VIII.

CONTRACTS VOID AND VOIDABLE.

A CONTRACT though valid to begin with, may be annulled at the instance of a party who gave his consent to it—

(a) On the ground of want of capacity. (See *infra*, pp. 348 *seq.*)

(b) If he gave it in mistake, provided the error was of the kind described later.

(c) If he was induced to consent by deceits practised by the other party or to which such party was privy; or

(d) If he was coerced into the contract by duress or violence.

Mistake, duress, or fraud are commonly spoken of as the vices of consent, that is, they are the defects which vitiate the consent.

Neither the French nor the Egyptian Code distinguishes at all clearly between those contracts which are void from the beginning and those which are voidable, that is to say, which are valid to begin with but are liable to be attacked and annulled upon certain legal grounds.

In the Egyptian Codes this distinction is not made in express terms. Indeed, at first sight the argument is plausible that the Egyptian Codes do not mean to retain the distinction between void and voidable contracts. *No agreement can give rise to the obligation which it is intended to create, unless the party who binds himself has capacity to contract and has given a valid consent.* (C. C. E. 128/188.)

Consent is not valid if it has been given by mistake or obtained by duress or fraud. (C. C. E. 133/193.)

But a closer examination of the codes shows that there is no intention to depart from the traditional French law.

Any doubt as to whether the Egyptian Codes retain the distinction between void and voidable contracts is removed by the article which declares that *persons having capacity cannot set up as against the parties with whom they have contracted the nullity of the contract, resulting from the want of capacity of the latter.* (C. C. E. 132/192.)

It is, likewise, true that a party to a contract cannot get it annulled on the ground of his own fraud or violence.

In an Egyptian case A wanted to borrow money from B. B said he would lend it only on condition that A signed a deed to a certain effect. A pretended to sign the deed, but, instead of writing his name he wrote in Hebrew letters which B could not read words equivalent to "declares he does not accept."

It was held that A was bound in spite of his fraud. (C. A. Alex. 20 févr. 1896, B. L. J. VIII, 132.)

The distinction between void and voidable contracts is one which lies in the nature of things. It is only when there is no agreement at all, or when the law declares that the agreement is unlawful, that the contract is null as regards both parties.

When there is an agreement and one which the law can recognise, the fact that the obligation of the one party is annulled on the ground that he did not give a valid consent does not affect the validity of the obligation of the other party. And the Egyptian Codes intend to make the same distinction in the article which says "an obligation *exists only* if it has a definite and lawful cause." (C. C. E. 94/148.)

The form of expression here differs from that employed by the code in dealing with contracts which are vitiated by want of capacity or by mistake, duress or fraud. In these cases the code says the *vice* is a cause of nullity. It does not say that the contract does not exist. (C. C. E. 131/191; 134/194; 135/195; 136/196.) It is clear that the Egyptian legislator meant to make this distinction when we compare article 94 with the corresponding article in the French Code: *L'obligation sans cause, ou sur une fausse cause, ou sur une cause illicite, ne peut avoir aucun effet.* (C. C. F. 1131.)

The French Code says, on the other hand, when speaking of vices of consent, *La convention contractée par erreur, violence ou dol n'est point nulle de plein droit; elle donne seulement lieu à une action en nullité ou en rescision.* (C. C. F. 1117.)

But in other articles the French Code applies the terms *null* and *nullité* without distinction to acts which are void and to those which are voidable. (Cf. C. C. F. 502, 931, 943, 944, 945, 970, etc. with arts. 225, 472, 1110, 1111, 1116.)

Notwithstanding the lamentable lack of precision in the codes the distinction between void and voidable contracts is important, and is one which is recognised by the doctrine and by the jurisprudence.

There is, however, much controversy as to whether it is desirable or necessary to make a further distinction. Many French autho-

rities subdivide the void contracts into *contrats nuls de plein droit*, and *contrats inexistants*. According to them there are three degrees of nullity.

(1) Acts inexistent.

The act here does not contain one of the elements which are essential to an act of that kind. It has no legal effect at all. Such, for example, is a declaration of will made by an imbecile or a baby. Such, likewise, is an apparent contract in which there was no agreement as to the nature of the contract or as to its object, for example, a sale without a price, or a payment when there was no debt, or a marriage celebrated between two persons of the same sex. Some authors would include in this category an act which needs to be made in a solemn form when the formalities have not been complied with. The form is essential—*forma dat esse rei*. (Aubry et Rau, 5th ed. 1, p. 180.)

But as M. Planiol says, the donation made by a private writing has all the elements of a gift. If it produces no effect this is because of some special provision of law. (1, n. 349.) The inexistent contracts are sometimes called *actes non avenus*.

(2) Acts absolutely void.

Here all the elements required are present, but the act is null because it is forbidden by the law. In this class will fall all contracts contrary to law or to good morals, and also if the view just referred to is accepted contracts of solemn form which are not made in the required manner. The acts in this group are commonly called *actes nuls de plein droit*.

(3) Acts voidable.

These are the acts about to be considered which are valid at first, and produce legal effects, but are liable to be challenged and annulled. They are generally designated as *actes annulables*. (See, for this threefold division, Demolombe, 24, n. 41 and n. 76, 29, n. 21; Larombière, art. 1304, n. 13; Capitant, *Introduction*, 3rd ed. p. 289.)

No necessity for the threefold division.

Although the threefold classification above presented is quite logical, it is not of any importance to distinguish between the

inexistent acts and the void acts. From the practical point of view, it makes no difference whether the act is placed in the one group or in the other. And, as M. Bufnoir says, if a contract produces no legal effect because it is forbidden by law we may say, *qu'un pareil contrat est réputé aux yeux de la loi n'avoir pas été consenti*. (*Propriété et Contrat*, p. 647, *in fine*.) It is simpler to content ourselves with the division between void and voidable contracts. (Planiol, 1, n. 332; B.-L. et Barde, 3, n. 1931; Colin et Capitant, 1, p. 79.)

Importance of distinction between void and voidable contracts.

The distinction between void and voidable contracts is one which arises from the nature of things and is recognised in different legal systems. It is a traditional principle of the French law and was taken by it from the Roman law. When the Roman lawyers wanted to distinguish an act which was absolutely null from an act which was merely liable to challenge they used of the former some expression such as *nihil actum est*; or *nullum est negotium*. (See Dig. 24. 1. 9. pr; Dig. 14. 1. 3; Dig. 4. 4. 16. 1.)

The old French writers seldom distinguish the two things with much precision, and they generally use the term *nul* to denote either the absolute or the relative nullity. But they do not fail to make the distinction in practice because they explain how in some cases the nullity may be validated, whereas in other cases this cannot be done. (Brissaud, *History of French Private Law in Continental Legal History Series*, ss. 379 seq.; Colin et Capitant, 1, p. 74.)

Characteristics of void contracts.

(1.) A void contract never produces any legal effect; it creates no right on the part of the apparent creditor, nor any duty on the part of the apparent debtor. It is *nul de plein droit*. *Quod nullum est, nullum producit effectum*.

When its validity has to be inquired into by a court, the court does not annul it, but simply declines to recognise its existence. (B.-L. et Barde, *Oblig.* 3, n. 1932; Planiol, 1, n. 338.)

But the statement that a void contract does not produce any legal effect is one which is liable to be misunderstood.

The void contract has not created any legal rights or liabilities but it may have created a different situation of fact, and the party

who desires a return to the *status in quo ante* is obliged to invoke the intervention of the courts.

If, for example, money has been paid or property delivered under an unlawful contract it cannot be taken back by force; the party who claims the restitution must apply to the court, and the court, if convinced of the justice of his demand, will disregard the contract. It will no doubt state its reasons for so doing, but it does not need to annul the contract, for it was null from the first. (Planiol, 1, n. 330; *contra*, Aubry et Rau, 5th ed. 1, p. 184.)

MM. Aubry and Rau contend that whatever may be the nature of the nullity the act produces its effect until it is annulled. (As to repetition of what has been paid in virtue of an *unlawful* contract, see *supra*, p. 175.)

(2.) Any person having an interest may claim that the void contract produces no effect, and, if such a contract is founded upon in a court of justice, it is the duty of the court to declare *ex officio* that it is void. (B.-L. et Barde, 3, n. 1932; Dall. *Supp. Oblig.* n. 1263.)

(3.) No confirmation by the parties or one of them can give validity to the void contract.

The nullity is a nullity of public order. (Aubry et Rau, 5th ed. 4, p. 431; Colin et Capitant, 1, p. 76; Req. 15 juill. 1878, D. 79. 1. 22.)

(4.) The contract can never acquire validity by prescription. *Quod nullum est nullo lapsu temporis convalescere potest.*

But as to this point also a caution is necessary.

The party claiming to be a creditor under the void contract cannot enforce its execution although the other party has taken no steps to challenge the contract, and has remained inactive for the long period of prescription. The defendant can always invoke the exception of nullity.

But if, on the other hand, the plaintiff is claiming the repetition of something paid under the void contract or the restoration of the *status in quo ante* he may be met by the defence that the defendant has acquired by prescription, or that the plaintiff's action is extinguished by prescription, unless his action was by its character imprescriptible. If this defence of extinctive prescription succeeds, the plaintiff will fail, not because the contract is recognised, but because he is seeking to disturb a situation of fact which has existed for the long period of prescription.

It is not that the contract has become good, but that the action

has prescribed. (B.-L. et Barde, 3, n. 1932, *in fine*; Colin et Capitant, 1, p. 77; Rennes, 19 mai 1884, S. 1885. 2. 169, note by M. Labbé; Cass. 6 nov. 1895, D. 97. 1. 25.)

But in this connection we must not forget that, according to the prevailing theory in the French law, the right of property in an immovable is not subject to be lost by extinctive prescription. (B.-L. et Tissier, *Prescription*, 3rd ed. n. 594; Aubry et Rau, 5th ed. 2, p. 475, note 4; Colin et Capitant, 1, p. 982; Req. 12 juill. 1905, D. 1907. 1. 141; *contra*, Req. 5 mai 1879, D. 80. 1. 145.)

In principle the French and Egyptian law does not allow the revindication of moveables. *En fait de meubles la possession vaut titre*. But in the exceptional cases in which this action is competent it is apparently extinguished by the long period of prescription when a shorter period is not fixed by the codes. (Planiol, 1, n. 2459, and n. 2480; Civ. 7 févr. 1910, D. 1910. 1. 201, S. 1910. 1. 225.)

Characteristics of voidable contracts.

The voidable contracts—*contrats annulables*—differ widely from the void contracts.

The voidable contracts are:—

(1) Those made by an incapable person, unless his incapacity was absolute, as in the case of a lunatic or a baby.

(2) Those made by a capable person whose consent was (a) given in mistake, provided the mistake was of the kind afterwards explained; or (b) was induced by fraud practised by the other party or to which he was privy; or (c) was the effect of duress.

The common feature in all these cases is that the law gives a special protection to the particular party. The contract is not null upon grounds of public interest, but the party protected has a right to ask that it should be annulled in his private interest.

Accordingly the rules are:—

(1) The contract is perfectly valid to begin with and produces its legal effects.

(2) The action to have it annulled is competent only to the party protected.

(3) If the person who has the right to attack the contract confirms it in the manner and subject to the conditions which will be stated later the contract is henceforth unchallengeable.

(4) If the challenge is not made within a certain period the

right to challenge is lost by prescription. (B.-L. et Barde, 3, n. 1932; Colin et Capitant, 1, p. 79; Capitant, *Introduction*, 3rd ed. p. 298.)

The French Code has a special prescription by ten years of actions in nullity of contracts. (C. C. F. 1304.) The Egyptian codes, however, leave this action to be governed by the general rule by which all obligations unless specially excepted by the law prescribe in fifteen years. (C. C. E. 208/272; De Hults, *Rép. vo. Action en Nullité*, n. 19.)

(5) If the contract is annulled the parties are put back to the same position as if the contract had never been made.

Anything paid or delivered by either to the other must be restored. And the judgment of nullity produces its effect in France as regards third parties deriving rights from a party to the contract which has been annulled. (B.-L. et Barde, 3, n. 1967, and n. 1980; Aubry et Rau, 5th ed. 4, p. 427; Larombière, art. 1312, n. 1, and art. 1183, n. 73.)

But under the French law this rule is subject to two qualifications which apply likewise in Egypt. And the Egyptian Mixed Code has, in addition, created a third exception to the rule:—

(a) When it is an incapable person who gets the contract set aside for his incapacity, he is liable only to account for so much as is proved to have enured to his benefit in consequence of the performance of the contract. (C. C. E. 131/191; C. C. F. 1312.)

(b) The person who has received a thing under the contract and possessed it in good faith does not need to account for the fruits. (B.-L. et Barde, 3, n. 1969; Aubry et Rau, 5th ed. 4, p. 429; *contra*, Bufnoir, *Propriété et Contrat*, p. 698.)

(c) The Egyptian Mixed Code, but not the Native Code, contains a series of articles to protect hypothecary creditors in good faith whose right has been inscribed against being prejudiced by the annulment of their author's right on the ground of a vice of consent of the party from whom he acquired. (C. C. M. 176, 197, 340, 417. See C. A. Alex. 6 nov. 1901, B. L. J. XIV, 3.)

Comparison with other laws.

English law.

In the English law it is customary to make a threefold classification of those contracts which are either ineffectual from the first or liable to be avoided.

They are (a) void; or (b) voidable; or (c) unenforceable.

(a) A void contract is one which has no legal effect. If, for example, the offer and the acceptance do not correspond; if there is a mistake of the kind described later in the summary of the English law as to mistake; or if the agreement is to do something unlawful, there is in the phrase of Sir William Anson "the outward semblance without the reality of contract." (*Contracts*, 14th ed. p. 15, and p. 175. Cf. Pollock, *Contracts*, 8th ed. pp. 9, 58; Halsbury, *Laws of England*, vo. *Contract*, p. 331.)

In English law no rights can be derived from a void contract.

A sells goods to X on credit, having been led to believe that X was Y. Y sells the goods to M, who is in good faith. A can recover the value of the goods from M. *Lindsay v. Cundy*, 1878. 3 App. Ca. 459; 47 L. J. Q. B. 481. See Benjamin on *Sale*, 5th ed. p. 462.) There was here no *consensus* of the two minds. The parties were not really in agreement. There was a confusion between two names which resembled one another.

A thought he was dealing with the firm of Blenkiron & Co. whereas in reality he was dealing with a man named Blenkarn.

(b) A voidable contract is a contract which has a flaw in it of which one of the parties may take advantage within a reasonable time if he chooses to do so. But by the English law, when the seller of goods has a voidable title thereto, but his title has not been avoided at the time of the sale, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of the seller's defect of title. (Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 23.) The statute confirms what was the common law upon this point. (*Babcock v. Lawson*, 1880. 5 Q. B. D. 284, 49 L. J. Q. B. 408; Benjamin on *Sale*, 5th ed. p. 457.)

The English law gives in this way a similar protection to the innocent buyer of moveables as is given in the French law by the application of the rule *en fait de meubles la possession vaut titre*.

(c) Unenforceable contracts.

This term is sometimes used to describe those contracts which are valid in the sense that all the elements necessary to the contract are present but the contract is incapable of proof owing to some rule of the law. (Anson, *Contracts*, 14th ed. p. 16; Halsbury, *Laws of England*, vo. *Contract*, p. 331.)

Thus the want of written form or the failure to affix a revenue

stamp renders certain contracts incapable of proof. But such contracts are not void, still less illegal. They cannot be avoided by either party, and, though they cannot be sued upon, they may be looked at for any collateral purpose. Money paid in execution of such an agreement cannot be recovered back merely on the ground that the contract was unenforceable. A contract for the sale of goods of the value of ten pounds or upwards, although at first unenforceable for want of writing becomes enforceable if the buyer accepts part of the goods sold and receives them.

(*Sale of Goods Act*, 1893 (56 & 57 Viet. c. 71), s. 4; Benjamin on *Sale*, 5th ed. p. 198.)

And in the case of informal agreements for the purchase or hiring of land it is an admitted rule of equity that if possession of the land has been given and accepted under the contract the informal contract can be enforced. (See Pollock, *Contracts*, 8th ed. p. 697; Benjamin on *Sale*, 5th ed. 306, where other illustrations are given; *Maddison v. Alderson*, 1883, 8 App. Ca. 467, 52 L. J. Q. B. 737.)

Distinction between void and voidable contracts in recent codes.

The German and Swiss Codes and the Code of Morocco recognise the traditional distinction between void and voidable contracts. (German Code, art. 141. See note of M. Saleilles to French translation; Cosack, *Lehrbuch*, 6th ed. 1, p. 154, *in fine*; Code Féd. *Oblig.* arts. 20, 23; Rossel et Mentha, *Droit Civil Suisse*, 3, p. 44; Code Maroc. *Oblig.* arts. 19, 39, 62.)

The German Code introduces the remarkable innovation of allowing the person having the right of challenge to exercise that right by a simple declaration made to the other party without being under the necessity of raising an action (art. 143).

And the German Code creates a special rule for the estimation of the damages when a contract has been avoided. This will be explained later in the chapter on mistake in German law. (*Infra*, p. 287.)

Confirmation of voidable contracts in French and Egyptian law.

The right of challenge may be renounced by the party entitled to it.

When this takes place the voidable contract is said to be confirmed. It is commonly said that this confirmation has a retroactive effect.

But there is not in truth any retroactivity. The voidable contract took effect from its date but it was subject to challenge.

The confirmation makes it unchallengeable. (Planiol, 2, n. 1300; B.-L. et Barde, 3, n. 2014.)

But it will be mentioned presently that certain third parties are protected against being deprived of their rights by an act of confirmation. This subject of the confirmation of voidable contracts which is both important and difficult is inadequately treated in the French Code and is not explained at all in the Egyptian codes. The only reference to it in the latter is in the articles on the interpretation of agreements, where the Egyptian Code says, *Agreements, whatever may be the literal meaning of the terms used, must be construed according to the purpose which the parties appear to have had in view, and the nature of the contract, and also according to custom.*

The conditions upon which the continuance or confirmation of obligations is made to depend are to be construed on the same principle. (C. C. E. 138, 139/199, 200.)

The articles in the French Code are the following:

L'acte de confirmation ou ratification d'une obligation contre laquelle la loi admet l'action en nullité ou en rescision, n'est valable que lorsqu'on y trouve la substance de cette obligation, la mention du motif de l'action en rescision, et l'intention de réparer le vice sur lequel cette action est fondée.

A défaut d'acte de confirmation ou ratification, il suffit que l'obligation soit exécutée volontairement après l'époque à laquelle l'obligation pourrait être valablement confirmée ou ratifiée.

La confirmation, ratification, ou exécution volontaire dans les formes et à l'époque déterminées par la loi, emporte la renonciation aux moyens et exceptions que l'on pouvait opposer contre cet acte, sans préjudice néanmoins du droit des tiers. (C. C. F. 1338.)

Le donateur ne peut réparer par aucun acte confirmatif les vices d'une donation entre vifs; nulle en la forme, il faut qu'elle soit refaite en la forme légale. (C. C. F. 1339.)

La confirmation ou ratification, ou exécution volontaire d'une donation par les héritiers ou ayants cause du donateur, après son décès, emporte leur renonciation à opposer soit les vices de forme, soit toute autre exception. (C. C. F. 1340.)

The prescriptions as to form laid down in C. C. F. 1338 cannot be imported into the Egyptian law in the absence of the special text. The Egyptian courts have simply to decide whether there is sufficient evidence of the intention to confirm the voidable contract. (See C. A. Alex. 17 juin 1915, B. L. J. XXVII, 417.)

And the article 1340 lays down a rule very difficult to justify which, likewise, cannot be imported into the Egyptian law without a text. (See Planiol, 3, n. 2532; B.-L. et Barde, 3, n. 1999.)

How can the heirs give life to a deed which was still-born? They can if they choose give effect to what their deceased intended, but this is not an act of confirmation.

The great defect of the French articles is that they lay down certain formal requirements of an act of confirmation without stating except by inference what confirmation is, what acts may be confirmed, at what period a voidable contract may be confirmed, what are the requisites of confirmation, what are the different modes of confirmation, and what are its effects. These points must be considered.

Nature of confirmation.

Confirmation is the renunciation of the right to challenge a voidable contract. It is more than the mere renunciation of a legal right because its effect is to render a contract unassailable.

It differs from novation because there is no old obligation replaced by a new one—*confirmatio nil dat novi*. (Aubry et Rau, 5th ed. 4, p. 430; Demolombe, 29, n. 725.)

And, although the French articles use the term *ratification* as equivalent to *confirmation*, it is better to confine the term ratification to the adoption by a party of an obligation made on his behalf by another without mandate, or at most to extend that term, as the Egyptian Code does, to the acceptance by a third party of a stipulation made for his benefit. (C. C. E. 527/648, 137/198; C. A. Alex. 2 mars 1916, B. L. J. XXVIII, 184; Aubry et Rau, *loc. cit.*; B.-L. et Barde, 3, n. 1985.)

We shall here employ the term confirmation only to denote the juridical act which makes a voidable contract unchallengeable.

Confirmation being a renunciation, though a renunciation of a special kind, it follows that it needs no acceptance. (Aubry et Rau, 5th ed. 4, p. 444; Demolombe, 29, n. 768.)

It follows likewise, as matter of proof, that the presumptions are against it. The party whose interest it is to prove the confirmation has the *onus* of proof.

The French article 1338 insists on certain formal mentions in an act of confirmation. And although the Egyptian law makes no similar requirements it is in accordance with general principles that ratifications like all renunciations must be clearly proved. (See Aubry et Rau, 5th ed. 4, p. 439; Cass. 25 nov. 1908, D. 1910. 1. 85; C. A. Alex. 20 déc. 1906, B. L. J. XIX. 45.)

What contracts can be confirmed.

Only those contracts can be confirmed which are voidable by reason of the temporary incapacity of a party or owing to his consent having been vitiated by mistake, violence, or fraud.

There can be no confirmation of a contract which was prohibited by law or of an alleged contract to which one of the parties gave no consent at all. (Demolombe, 24, n. 81; Aubry et Rau, 5th ed. 4, p. 431; Limoges, 22 juill. 1873, D. 74. 2. 68.)

And if the law prescribes certain forms as essential to the formation of a particular class of contracts there can be no confirmation of a contract of that class made without observing the required form. The French article 1339 which says that a gift made without authentic form cannot be confirmed merely gives an application of the general principle. The Egyptian law is the same. It is implied in the idea of confirmation that the contract was not void *ab initio*. (B.-L. et Barde, 3, n. 1992; Aubry et Rau, 5th ed. 4, p. 430; De Hults, *Rép.* vo. *Confirmation*, n. 4.)

Period when confirmation is possible.

In order that a contract should be confirmed it is necessary that the cause which made it voidable should be no longer operative.

If the contract was voidable on the ground of minority by the personal law applicable, it is clear that the minor cannot confirm it until he attains majority. (See C. A. Alex. 17 juin 1915, B. L. J. XXVII, 417.) If it was voidable by reason of mistake, fraud, or violence it cannot be confirmed until the mistake or the fraud has been discovered or the violence has ceased. (Aubry et Rau, 5th ed. 4, p. 437; B.-L. et Barde, 3, n. 2007 c.; Paris, 12 janv. 1906, D. 1906. 2. 361.)

Requisites of confirmation.

It must appear clearly that the party was aware of the defect which made the contract voidable and that of his own free will he declared his intention not to exercise his right to challenge it.

If there were several defects and he knew of some of them only the confirmation will not be valid as regards the defects of which he was not aware. (B.-L. et Barde, 3, n. 2004 b; Req. 21 févr. 1899, D. 99. 1. 512; Besançon, 6 févr. 1901, D. 1902. 2. 119.)

When the confirmation is in writing the French Code requires *la mention du motif de l'action en rescision et l'intention de réparer le vice sur lequel cette action est fondée* (C. C. F. 1338), and though the Egyptian Code has no such text the law none the less requires that there shall be sufficient evidence of the intention. (Cf. C. A. Alex. 24 févr. 1897, B. L. J. IX, 171.)

It is generally in cases where there is said to have been tacit confirmation that the question presents itself whether there was knowledge of the vice and voluntary intention to repair it.

Confirmation express or tacit.

Confirmation does not need to be express. It may be implied from conduct. This is stated in the French Code: *A défaut d'acte de confirmation ou ratification, il suffit que l'obligation soit exécutée volontairement après l'époque à laquelle l'obligation pouvait être valablement confirmée ou ratifiée.* (C. C. F. 1338.)

And it is settled in the French law that voluntary execution is not the only case of tacit confirmation. Any act which clearly indicates the intention to renounce the right of challenge is a tacit confirmation if it was done voluntarily, with knowledge of the defect which made the contract voidable, and by a party possessing the necessary capacity. (Aubry et Rau, 5th ed. 4, p. 443: B.-L. et Barde, 3, n. 1989; Req. 25 mai 1886, D. 87. 1. 379; Cass. 2 janv. 1901, D. 1903. 1. 573; Req. 13 janv. 1902, D. 1903. 1. 224.)

The payment of the price, the reception of goods, the payment of interest, and many other acts, may, in the particular circumstances, amount to tacit confirmation. (See C. A. Alex. 2 mars 1916, B. L. J. XXVIII, 184.)

The right to challenge a voidable contract is frequently lost in this way before the expiration of time fixed by law for the prescription of the action in nullity.

For instance, in a Quebec case, a manufacturer had hired certain machinery.

He discovered later that he had been induced by false and fraudulent representations as to the character of the machinery to consent to very onerous conditions in the lease. Notwithstanding this discovery, he continued for several months to use the machinery without complaining of the fraud.

Thereafter, he brought an action to have the lease annulled for fraud. It was held that his use of the machinery showed that he had renounced his right of challenge. (*United Shoe Machinery Co. v. Brunet*, 1909, R. J. Q. 18 K. B. 511; 1909, A. C. 330, 78 L. J. P. C. 101.)

Tacit confirmation may result from an act done with a third party.

If the buyer of an immoveable knowing that he has a right to challenge the sale, instead of doing so, sells the immoveable to another he thereby renounces his right. (Aubry et Rau, 5th ed. 4, p. 443, note 31 *ter*; B.-L. et Barde, 3, n. 1990; Req. 26 févr. 1877, D. 78. 1. 162.)

In the French law this conclusion is supported by analogy from C. C. F. 892. But no text is necessary. The conclusion follows from the general principles of the subject.

Likewise, a unilateral act may indicate confirmation. If the purchaser of an immoveable instead of exercising his right to challenge the sale, proceeds to build upon the immoveable he cannot turn round afterwards and bring his challenge. (B.-L. et Barde, 1, c; Demolombe, 29, n. 782.) Partial execution of the contract indicates the intention to confirm it as well as total execution. (Aubry et Rau, 5th ed. 4, p. 442; Demolombe, 29, n. 775.)

But if the act is equivocal, that is if it can be interpreted either as a confirmation or in some other way, it will not be considered as a confirmation. Thus if a debtor pays his debt not voluntarily but to escape from an execution or an action at the instance of the creditor this is not a confirmation. It is prudent in such cases for the debtor to make protests or reservations but this is not indispensable. The question is one of intention. (Aubry et Rau, 5th ed. 4, p. 443; Demolombe, 29, n. 776; Lyon, 5 juin 1852, D. 52. 2. 234; Besançon, 6 févr. 1901, D. 1902. 2. 119. Cf. C. A. Alex. 24 févr. 1897, B. L. J. IX, 171.)

Effects of confirmation.

(a) As between the parties.

The effect of confirmation as between the parties has been explained above in describing the character of confirmation. It deprives the party of his right of challenge.

As the French article expresses it confirmation *emporte la renonciation aux moyens et exceptions que l'on pouvait opposer*

contre cet acte, sans préjudice néanmoins du droit des tiers.
(C. C. F. 1338.)

(b) As against third parties.

The French article expressly says that the confirmation is not to prejudice third parties who have acquired rights. It is necessary to consider whether the same reservation exists in the Egyptian law, and if so, who are to be regarded as third parties in this case.

Although there is no text in the Egyptian Code it would appear that the Egyptian law does not allow confirmation to prejudice the rights of third parties. (See De Hults, *Rép. vo. Confirmation*, n. 24.)

The contrary conclusion besides being grossly inequitable would be contrary to the settled rules of interpretation of contracts, and the Egyptian Code says that acts of confirmation are to be interpreted upon the same principles as agreements. (C. C. E. 139/200.)

This will appear more clearly when we explain who are the third parties in question.

Who are the third parties protected.

It is agreed in the French law that by "third parties" here the code intends the class of persons who cannot be prejudiced by a private document unless it has a legally established date prior to that at which their rights were acquired. (C. C. F. 1328; C. C. E. 228/293.) That is to say by "third parties" is meant the successors by particular title of the person confirming the contract to whom before the confirmation he granted a real right over the thing which was the object of the contract, which right would be destroyed or diminished if the confirmation could be set up as against them. (B.-L. et Barde, 3, n. 2015; Aubry et Rau, 5th ed. 4, p. 446.)

For successors of this kind, though they derive their rights from the party confirming, and are in that sense his *ayants cause*, have acquired from him rights which are henceforth independent of him and which he cannot take away or diminish.

Their rights, as M. Planiol expresses it, are incompatible with the *maintenance* of the voidable contract (2, n. 1301). Another way of stating the principle is to say that the third parties protected are those who, having dealt with the party to the voidable contract who had the right to challenge it, have thereby acquired

a right to avail themselves of this right of challenge. Suppose, for example, a minor hypothecates an immoveable. Subsequently he sells the immoveable. This indicates his intention to avail himself of the nullity. Thereafter, when he has attained majority he affects to confirm the hypothec which he had created when he was a minor. This confirmation cannot prejudice the right of the buyer of the immoveable. He acquired it, in the absence of any indication to the contrary, with a hypothec upon it, but a hypothec which was liable to challenge. The presumption is that the minor conveys this right of challenge to the purchaser. (Colin et Capitant, 2. p. 239.)

Chirographic creditors are not third parties.

It is certain that the chirographic creditors of the party confirming are not protected. Such creditors have what the Egyptian Code describes as "a general right over the property of their debtors" or what the French Code styles a *gage commun*. (C. C. E. 141/202; C. C. F. 2093.)

But this right does not entitle them to prevent their debtor from alienating his estate unless indeed he is insolvent and the other conditions are present which the law requires for the exercise by creditors of the Paulian Action.

A confirmation by a solvent debtor of a voidable contract is unchallengeable. It is immaterial whether or no the claims of such creditors have a legally established date prior to the confirmation.

The principles governing this matter are fully explained elsewhere in the discussion of the Paulian Action. (Cass. 8 mars 1854, D. 54. 1. 191; Demolombe, 29, n. 792; B.-L. et Barde, 3, n. 2022.)

Purchasers and grantees of real rights are third parties.

Within the definition of "third parties" clearly fall purchasers or donees of the thing and persons to whom a real right over it was conceded prior to the confirmation. If a minor sells an immoveable without the necessary formalities he can challenge the sale.

If after majority he resells the immoveable to a second purchaser, he cannot, thereafter, confirm the first sale. This would be to allow him to defeat his own grant.

At the time when he made the second sale he had the power by

exercising his right of challenge of transferring the ownership to the second purchaser.

In making the second sale he bound himself tacitly to make his contract effective, and that he would not by any later act on his part prevent the purchaser from receiving what he had been promised. Now the second sale cannot be fully effective until the first sale has been annulled. It follows, therefore, that the vendor must be taken as having ceded to the second purchaser the right to challenge the first sale. The vendor cannot be allowed to defeat this by subsequent confirmation of the first sale. This would be a breach of his implied warranty against his personal acts. (Larombière, art. 1338, n. 58; B.-L. et Barde, 3, n. 2016.)

The same principle applies to the case of a hypothec granted by a voidable contract before a sale, as we have seen in the illustration given above.

The question resolves itself into one of interpretation of contracts, and this reason is by itself sufficient to justify us in concluding that the Egyptian law is the same as the French law. (C. C. E. 139/200.)

Successive hypothecs.

But suppose that we are in presence of two successive hypothecs. A grants a hypothec to B by a voidable contract.

Thereafter, A grants a hypothec over the same immovable to C. Can A by confirming the voidable contract make B's hypothec unchallengeable and give it a preference, as being earlier in date, over the hypothec in favour of C?

This is a highly controversial question. It was debated in the old French law before the code. (See Pothier, *De l'hypothèque*, n. 46; and *Introduction au tit. XX de la Coutume d'Orléans*, n. 24.) And since the code French writers have been much divided upon the point.

Leaving out of discussion certain theories which are now abandoned there are two *systèmes* which divide the French authors:

(a) First system.

In the opinion of one school confirmation produces by its nature a retroactive effect to the date of the agreement confirmed. It is not, it is true, allowed to prejudice the acquired rights of third parties; but we must examine carefully what these acquired rights are. If a creditor is granted a hypothec by a debtor who had

previously hypothecated the same immoveable to another under a voidable agreement, the second creditor has notice of this prior hypothec by the fact of the inscription.

He knows that it is liable to be confirmed, and that, if this happens, his hypothec will remain a second hypothec. There is nothing unusual in a debtor creating a second hypothec over an immoveable. It is not at all like the case of a man selling to A what he has already sold to B. Why should we presume that in granting the second hypothec the grantor renounces by implication his right to confirm the first hypothec? (Aubry et Rau, 5th ed. 3, p. 453; Pont, *Privilèges et hypothèques*, 2, n. 616.)

(b) Second system.

The tendency of the French doctrine and jurisprudence is to reject the opinion above stated.

According to the prevailing view the second hypothecary creditor succeeds to the right to challenge the validity of the first hypothec. He cannot be prejudiced by this hypothec unless he allows the prescriptive period to elapse without bringing the action of nullity. The arguments in favour of this opinion are as follows:—

It is not to be assumed as a matter of course that the second creditor knew of the first hypothec. But even upon that assumption, he knew also that this first hypothec was voidable. He knew the rule of law that confirmation of such a contract must not prejudice third parties such as himself, and he relied upon this legal protection. He counted on acquiring a first hypothec because the hypothec inscribed before his was one which could be got rid of by an action at his instance. In creating the second hypothec the debtor by implication assigned his right to avoid the first.

On the whole this opinion appears to be the sounder of the two, but it must be admitted that the question is delicate. (B.-L. et Barde, 3, n. 2017; B.-L. et Loyne, *Nautissement*, etc., 2, n. 1335; Demolombe, 29, n. 797; Toulouse, 26 juin 1889, D. 91. 2. 65.)

English law as to confirmation of voidable contracts.

The English law offers interesting analogies.

(a) Mistake.

The party entitled to treat an agreement as void on the ground of mistake may, after the true state of the facts has come to his

knowledge, elect to adopt the agreement, or, if that is not a correct way of stating it, he may carry out his former intention which was not binding. (Pollock, *Contracts*, 8th ed. p. 616.)

It must be remembered that although in the English law the contract is in this case void and not merely voidable it does not follow that either party can claim the nullity. The party who by his misrepresentation has led the other into the mistake is estopped.

He cannot deny the validity of the contract if the party whom he has misled elects to treat it as valid. (*Pickard v. Sears*, 1837, 6 A. & E. 469, 45 R. R. 538; Anson, *Contracts*, 14th ed. 193; Pollock, *Contracts*, 8th ed. p. 557.)

(b) Fraud.

Likewise the party who has been induced to contract by fraud, after he has notice of the fraud, is put to his election.

"Unless and until he makes his election and by word or act repudiates the contract, or expresses his determination not to be bound by it (which is but a form of repudiation), the contract remains as valid and binding as if it had not been tainted with fraud at all." (*Per* Lord Atkinson in *United Shoe Manufacturing Co. v. Brunet*, 1909, A. C. 330, 78 L. J. P. C. 101, 104; *Clough v. L. & N. W. Ry.*, 1871, L. R. 7 Ex. 26, 41 L. J. Ex. 17.)

His conduct must show that he did not intend to repudiate.

Thus, where a person was induced by fraudulent misrepresentations to take a lease of a mine and after discovery of the fraud he continued to work the mine he was held to have lost his right to disclaim the lease. (*Vigers v. Pike*, 1842, 8 Cl. & F. 562, 54 R. R. 114.)

See Leake, *Contracts*, 6th ed. 258; Pollock, *Contracts*, 8th ed. 624. And see the cases cited in *Laws of England*, vo. *Misrepresentation and Fraud*, p. 749.)

Moreover, without such positive acts of affirmance, "Lapse of time without rescinding will furnish evidence that he has determined to affirm the contract, and where the lapse of time is great, it probably would in practice be treated as conclusive evidence to show that he has so determined." (*Clough v. L. & N. W. Ry.*, *ut supra*; *Sharpley v. Louth Ry.*, 1876, 2 Ch. D. 663, 46 L. J. Ch. 259; Leake, *Contracts*, 6th ed. p. 259; Pollock, *Contracts*, 8th ed. p. 629.)

(c) Undue influence.

The same principle applies in cases where the contract is voidable on the ground that it was procured by what the English law calls "undue influence." (*Infra*, p. 307.)

A lady made gifts of large amount to the lady superior of a religious sisterhood of which the donor was a member. The gift was for the benefit of the sisterhood. These gifts included two sums of railway stock. The donor afterwards left the sisterhood and claimed return of the two sums of railway stock which were still standing in the name of the lady superior and unapplied. It was held that the plaintiff, having been at the time of the gifts a professed sister, and as such bound to render absolute submission to the superior of the sisterhood, was "not in the largest and amplest sense of the term, not in mind as well as in person an entirely free agent."

There was "undue influence" in the sense of the law. But the action failed because it was held that the plaintiff after leaving the sisterhood had shown by her conduct, and more particularly by not making any claim for more than five years, that she had elected not to avoid the gift or, in other words, that she had confirmed it. (*Allcard v. Skinner*, 1887, 36 Ch. D. 145, 56 L. J. Ch. 1052.)

(d) Delay in bringing action.

In the English law an action of damages for fraud must be brought within six years. (See for certain distinctions as to the date from which the prescription, or, as it is called in English law, the "limitation of actions," runs, *Laws of England*, vo.: *Limitation of Actions*, p. 49.)

In actions for rescission of contracts there is no fixed period of prescription or "limitation."

But the court will not grant relief unless the plaintiff comes with great promptitude.

The plaintiff must repudiate the contract at the earliest possible moment. (*Seddon v. North Eastern Salt Co.*, 1905, 1 Ch. 326, 74 L. J. Ch. 199.)

But in no case would relief be granted when the action was brought more than six years after the plaintiff knew the facts. (*Molloy v. Mutual Reserve Insur. Co.*, 1906, 94 Law Times, 756, Mews Digest, 9, p. 1889; *Oelkers v. Ellis*, 1914, 2 K. B. 139, 83 L. J. K. B. 658; *Laws of England*, vo. *Equity*, p. 174.)

(e) Minority.

In regard to the ratification of contracts made during his minority by a person after attaining his majority, the English law differs widely from the French law and cannot here be explained in detail. The rules of the common law have been modified by statute. (Infants Relief Act, 1874, 37 & 38 Vict. c. 62.)

Certain classes of contracts made by a minor, or, as he is called in the English law, an "infant," are absolutely void and of these no ratification is possible.

These contracts are those (a) for money lent or to be lent; (b) for goods supplied or to be supplied (other than necessities); and (c) accounts stated.

By "accounts stated" is meant an admission by one who is in an account with another that there is a balance due by him.

Moreover, another large class of contracts made by an infant cannot be ratified.

This class includes all contracts except such as are (a) incident to interests in permanent property, or (b) for the infant's benefit, and, especially, for necessities. (See, for details, Pollock, *Contracts*, 8th ed. 56; Leake, *Contracts*, 6th ed. 386; Anson, *Contracts*, 14th ed. 137.)

CHAPTER IX.

THE VICES OF CONSENT.

Mistake.

As we have seen already, the "vices of consent" which render a contract voidable in the sense and with the effects explained in the preceding chapter are three, namely, mistake, duress and fraud. (N. C. C. 134, 135, 136; M. C. C. 194, 195, 196.) These vices of consent must be explained in detail.

The voidability which results from a want of capacity in one of the parties will be explained under the head of capacity.

Mistake or error.

The language of the Egyptian Codes upon this "vice of consent" is very unsatisfactory.

The Native Civil Code says, *Mistake is a cause of nullity of consent, when it relates to the essential aspect under which the thing was contemplated in the contract.* (N. C. C. 134.)

The Mixed Civil Code says, *Mistake renders the consent void when it affects the main description under which the subject-matter of the contract has been regarded in the contract.* (C. C. M. 194.)

These definitions are intended to be an improvement on that of the French Code, *error is a cause of nullity of the contract only when it relates to the substance itself of the thing which is the object of the contract.* (C. C. F. 1110.) But all the definitions are singularly obscure. The kind of error of which the codes are speaking is an error which did not prevent the formation of consent. The codes say nothing about the kind of error which prevents any contract ever being formed, or as French writers put it, makes the contract inexistent. Of this kind of error there are three cases:—

(1) Error as to the nature of the agreement, for example, where one man intending to sell an object to another delivers it to him, and the other receives it under the impression that it is a gift, or when one who intends to buy a house and believes he is doing so, in reality signs a lease. (D. *Rép. Oblig.* n. 113.) So, in a

Quebec case, when an illiterate man signed a paper which he believed to be an order for goods, and it was really a promissory note. (*Banque Jacques-Cartier v. Lalande*, 1901, R. J. Q. 20 S. C. 43.) Or when a man effects an insurance with a company which he believes to be a mutual assurance company whereas in fact it is a company which insures for fixed premiums. (Req. 6 mai 1878, D. 80. 1. 12; Besançon, 30 déc. 1891, D. 92. 2. 157.) This kind of error is sometimes called *error in negotio*.

(2) The parties to the contract have not in mind the same object. For example, I intend to sell you my black horse and you think you are buying my brown horse. (B.-L. et Barde, 1, n. 52; Demolombe, 24, nos. 49 and 87; Colin et Capitant, 2, p. 295; D. N. C. C. art. 1110, n. 21.)

(3) The error consists in believing that the obligation has a cause, whereas in fact it has none. For instance, you show me a will made by my father who has just died containing a legacy in your favour of a certain house. I promise that you should take a sum of money instead of the house, and you agree, and I sign an undertaking to pay you this sum on a certain date. I do so because I believe that, as my father's heir, I am bound to pay you the legacy. It is to liberate myself from this obligation that I agree to pay the money instead. This is what the French writers call an obligation *sur fausse cause*. It has been explained earlier in this work. (*Supra*, p. 52.)

In all these three cases there is no contract. The whole thing is a mistake. (Aubrey et Rau, 5th ed. 4, p. 495, note 5; B.-L. et Barde, 1, n. 52. Contrast the rule of the German law, *infra*, p. 278, and see as to the English law, *infra*, p. 269.)

But the error which is a vice of consent is not of this kind; the parties know what they are doing and what it is about which they are dealing. The contract is formed, but it is liable to challenge. It is necessary then to examine what kind of error produces this effect.

What kind of mistake makes a contract voidable.

It is not every mistake which will be a ground for setting aside a contract.

A party to a contract may be under serious error with regard to the advantage which is likely to accrue to him by the contract. He may have been induced to give his consent by a very false process of reasoning, or even by sheer mistake in his calculations,

but he cannot escape from his contract merely by saying that he made a mistake of this kind. It must be a mistake with regard to the thing which is the object of the contract. It must, to use the traditional expression, be a substantial or essential error. Whether the mistake is substantial or essential is a question of fact in the particular case. (See C. A. Alex. 7 janv. 1897. B. L. J. IX, 104; C. A. Alex. 1 déc. 1904. B. L. J. XVII, 28.)

But what are the marks of this substantial error?

The French Code gives no light upon this. It says merely:—*L'erreur n'est une cause de nullité de la convention que lorsqu'elle tombe sur la substance même de la chose qui en est l'objet.* (C. C. F. 1110.) But the difficulty is to know exactly what we mean by the "substance itself" of the thing. (See Rev. Trim. 1913, p. 807.) As to this there are three theories which find support among French writers.

(1.) By the substance of a thing is meant that combination of qualities which gives to the thing its specific character, and distinguishes it according to general opinion from things of any other kind. The combination of qualities which make up the animal which we call a horse is different from the combination of qualities which make up the animal which we call a cow. Or, without taking such an extreme instance, two things may resemble each other in many respects, or in general appearance, as, for example, flour and chalk, and yet, according to the common understanding of mankind, be clearly different things. A mistake is not substantial unless it consists in mistaking a thing of one kind for a thing of another kind. A mistake as to the quality of a thing can never be a mistake which is substantial. A horse is always a horse, and a bad horse differs from a good horse not in kind but only in quality. A picture is always a picture, whether it is by an old master or by a modern fabricator of imitations. A candlestick is always a candlestick, whether it is made of brass or of gold. The purchaser who bought a horse, or a picture, or a candlestick, will not be released from his bargain because he is able to show that he had in mind a thing of a different quality from that which has been delivered to him. If he bought a horse and has got a horse, there is no mistake as to the substance. It will, of course, be otherwise when he specially stipulated for a certain quality, or when he can prove that the vendor fraudulently concealed the truth. And it will be otherwise when there is a mistake as to the identity of a thing, as,

when he meant to buy the field X., and the seller thought he was selling the field Y. This system, still supported by eminent authorities in France, rests upon the strict interpretation of the words *la substance même* in the French article. (Aubry et Rau, 5th ed. 4, p. 490; Hue, 7, n. 22; Trib. Civ. de Muret, 14 févr. 1886, *joint à Toulouse*, 19 mars 1889, S. 90. 2. 61; Pau, 20 janv. 1875, D. 76. 2. 238.)

(2.) Other authorities say that what is meant by the substance of a thing is not necessarily that which distinguishes it from all other kinds of things. A silver candlestick and a brass candlestick are both candlesticks, but they are, nevertheless, different kinds of things. They would not be put by dealers in the same mercantile class. A statue or a picture by a great artist is a different thing from a copy of it by an unknown hand. An "antique" and a modern imitation of it are two different things. When the absence of certain qualities changes the nature of the thing so that it becomes a thing of another class, these qualities are substantial, and an error in regard to them is "substantial" error. The man who buys plated spoons in mistake for silver spoons, gets spoons it is true, but spoons which according to the common understanding of mankind, are spoons of a different class. (Colmet de Sauterre, 5, n. 16, *bis*, 11; Demolombe, 24, n. 90. Cf. D. Rép. *Oblig.* n. 130.)

(3.) Both the preceding theories have this in common, that there is no mistake as to the substance unless the two things differ in such a way that ordinary people would put them in different classes. The mistake as to the substance is, so to speak, objective; it is a mistake as to something which does not depend upon the intentions of the parties. In opposition to both of them comes what may be called the subjective theory, namely, that by the "substance" of the thing is meant that quality which the parties had mainly in view in making the contract, and the absence of which, if it had been known, would have prevented the giving of the consent. In the words of the Egyptian Code it is *the essential aspect under which the thing was contemplated in the contract*. (N. C. C. 134.) This is the view which is now supported by most of the writers in France, and is generally adopted by the jurisprudence. (Baudry-Lacantinerie et Barde, 1, n. 54; Larombière, on art. 1110, n. 3; Caen, 22 mars 1905, D. 1906..5. 8; Agen, 30 avril 1884, D. 87. 1. 105.) In other words, it may appear that in the particular contract a quality was treated as substantial which might not have been so considered

in another contract relating to the same thing. The question always is a question of fact. (Toulouse, 19 mars 1889. S. 90. 2. 61.) What particular quality had the parties specially in mind? This theory has the support of the high authority of Pothier, who says: *L'erreur annule la convention, non seulement lorsqu'elle tombe sur la chose même, mais lorsqu'elle tombe sur la qualité de la chose que les contractants ont eue principalement en vue, et qui fait la substance de cette chose.* Pothier goes on to say if I want to buy a pair of candlesticks, and I mistake candlesticks of silver-plate which you offer to me for silver candlesticks, my mistake annuls my consent, for it was silver candlesticks that I wanted, and candlesticks of silver-plate are not the same thing. (*Oblig.* n. 18.)

It is not necessary for us to discuss the question if the language of the French Code will bear the interpretation which the supporters of the subjective theory place upon it. For there is no reasonable doubt that the Egyptian Codes depart from the language of the French Code precisely in order to make it clear that the Egyptian legislator prefers the subjective theory. It is, according to the Native Code, *the essential aspect under which the thing was contemplated in the contract*, which the court has to consider in deciding if the mistake is a cause of nullity. (C. C. E. 134.) And the Mixed Code is to the same effect: *The main description under which the subject-matter of the contract has been regarded in the contract.* (C. C. M. 194.) If there has been a mistake as to this the contract can be annulled. Any quality is substantial if the parties choose to make it so. The Egyptian jurisprudence is in this sense, as indeed also is the French jurisprudence with the exception of a few isolated decisions. The Code of Quebec intends to adopt the subjective theory though the article is not very happily expressed. *Error is a cause of nullity only when it occurs in the nature of a contract itself, or in the substance of the thing which is the object of the contract, or in some thing which is a principal consideration for making it.* (C. C. Q. 992.) We have no need therefore to consider philosophical definitions of "substance." No doubt, when the two things of which one is mistaken for the other differ so widely that logicians would say the difference was one of substance, the presumption is that the mistake will annul the contract. But this is not always so, at any rate, if we consider, as most people do, that a difference of material creates a difference of substance. Silver goods and plated goods belong to different

classes of goods in a commercial sense, but if I buy a pair of antique candlesticks because they are good examples of the art of a period or because they happened to belong to Napoleon, it may be quite immaterial to me whether they are made of silver or silver-plate. I may have thought they were silver when I bought them, but I could not get the sale set aside on the ground that the candlesticks were not genuine silver, for the material of which they were made was a mere secondary consideration. A modern legal writer has analysed the meaning of "substance" in this way. He says qualities are to be considered as substantial: (1) which determine the species of the thing, that is, its falling into one category or another; (2) which by usage are treated as substantial, and are presumed to have been so regarded by the parties; (3) which on account of the special circumstances of the contract have been made substantial by the parties. (R. Fubini, in *Rev. Trim.* 1902, p. 301.)

When the mistake would fall under the first or second head there is a presumption that the mistake is essential. When the mistake falls under the third head it depends upon the circumstances of the particular contract if it is to be considered essential. But, as we have seen, even if the mistake is as to the category to which the thing belongs, as when silver-gilt candlesticks are bought as gold, it is still competent to show that this mistake was unessential, because the things were bought as works of art or relics.

Examples of essential mistake.

Modern instances in which the error has been held to be essential are the following:—

- Seeds of autumn wheat sold as spring wheat. (*Cass.* 24 juin 1867, D. 67. 1. 248.)

The sale of the bare ownership of an immoveable, when, unknown to the vendor and the purchaser, the usufructuary was dead at the date of the sale. (*Paris*, 13 déc. 1856, D. 57. 2. 73; *Req.* 8 mars 1858, D. 58. 1. 277.)

An insurance with a mutual-insurance company when the assured thought he was dealing with a company which insured him for a fixed premium. (*Req.* 6 mai 1878, D. 80. 1. 12. Cf. *Besançon*, 30 déc. 1891, D. 92. 2. 157.)

A picture bought as the original work of a certain master, when in fact it is not so. The fact that the picture by another hand has been touched up and signed by the master does not

make it his work. (Paris, 19 janv. 1898, *sous* Cass. 25 juill. 1900, D. 1904. 1. 611.)

An article bought as an "antique" when in fact it is not so. (Cass. 26 oct. 1886, D. 87. 1. 105; C. A. Alex. 19 mars 1913, B. L. J. XXV, 239; D. N. C. C. art. 1110, n. 56.)

But in the case of the picture or of the "antique" it must not appear that the buyer knew there was a doubt as to the authenticity and relied upon his own judgment. This point will be touched on again in speaking of the mistake of one party only.

Other illustrations from the jurisprudence of essential mistake are:—

Mistake as to the sex of an animal when this affects the use which is to be made of it. (D. *Rép.* vo. *Oblig.* n. 132.)

An animal sold as having a certain pedigree when this is not true. (Caen, 22 mars 1905, D. 1906. 5. 8.)

An object sold as a unique example of its kind, when other examples exist. This is a good illustration of the application of the subjective theory. A collector will be inclined to pay more for an object if he believes it to be a unique example. This may be for him *the essential aspect under which the thing is contemplated*.

In a Belgian case a collector of orchids bought an orchid which the vendor declared to be unique. This statement was made in good faith, but was untrue in fact. The vendor had previously sold a similar orchid to another purchaser, but he had been told by this purchaser and believed that this example had perished. The sale of the second orchid was annulled as made under essential error. (Trib. Comm. de Bruxelles, 27 mars 1906, D. 1906. 5. 63.)

The sale of a number of bales of merchandise unopened and sold on the footing that they contained goods of the same kind and value as those in a bale which had been opened, whereas in fact the unopened bales were of less value. (Cass. 5 nov. 1900, D. 1901. 1. 71.)

The sale of goods by sample when the goods are not up to the sample. The Mixed Court of Appeal says, *Une pareille action est motivée en effet par l'absence dans la marchandise rendue de certaines qualités substantielles que l'échantillon soumis y aurait laissé croire, absence de qualité constituant l'erreur sur la substance de nature à vicier le consentement*. (C. A. Alex. 13 mai 1914, Gaz. Trib. 4, n. 448.)

The sale of a machine as being of a certain horse-power, when in fact it is not. (C. A. Alex. 27 mai 1908, B. L. J. XX, 257.)

These may serve as examples.

Mistake as to some quality which the parties showed they regarded as essential.

There is, of course, no difficulty in annulling a contract of sale or any contract for the transfer of a thing, if the thing does not possess a certain quality for which the transferee expressly stipulated. If a man, for example, subscribes for an encyclopedia which is to be sold, and stipulates that he is to get a certain edition, he cannot be compelled to take another edition. (Req. 24 févr. 1875, D. 75. 1. 464.) In such a case it is not necessary to rely on the principle of essential error. The broad rule that one party to a contract cannot insist on performance by the other party if he himself is in breach of the contract is sufficient to dispose of the case. (See *supra*, p. 88.) But when there is no express stipulation of this kind it may nevertheless appear that the vendor knew the purchaser was relying upon the thing possessing a certain quality, or being suitable for a certain purpose. And if, as a matter of fact, the thing does not possess this quality, or is altogether unsuitable for the purpose in question, the sale may be annulled for essential error. In a French case a piece of ground was sold to be the site of a school. The vendor knew that it was destined by the purchaser for this purpose. According to law a school could not be built on a site of less than a certain size. The site sold here was too small to satisfy the requirements of the law. The sale was annulled for essential error. (Orléans, 18 janv. 1895, D. 95. 2. 417.)

Is mistake a cause of nullity in unilateral as well as bilateral contracts?

The law makes here no distinction between unilateral and bilateral contracts, and we are not entitled to make any. If I give you a gold watch, not knowing it to be gold, I have the same right to annul the contract as if I had sold it to you. (Baudry-Lacantinerie et Barde, 1, n. 57; Colmet de Santerre, 5, n. 16, *bis* 111.) But in the unilateral contracts, such as gift, or loan for use, the person who receives the thing even though he was under an essential mistake has no interest in annulling the contract, or, at any rate, it seems difficult to imagine a case in which he

would have an interest. It will therefore be only the other party who can challenge the contract on this ground. (Huc, 7, n. 26.)

Does the mistake need to be mutual?

According to the French writers it is not necessary that both parties should be under a mistake; it is enough that one party only should be under essential error. The arguments in favour of this opinion are these:—

1. The code does not make any distinction between mistake common to both parties and the mistake of one party, and upon general principles we are not entitled to introduce a distinction which the code does not make.

2. It is admitted that the other vices of consent, namely, fraud and violence, vitiate the contract, although they affect the will of one party only. Why should it be different with error which the code seems to place upon the same line with these as a vice of consent?

3. As we shall see later, there are some cases in which mistake as to the person is a cause of nullity. Now here the law cannot possibly require that the mistake should be shared by both parties. Why then should this be a requisite in the other cases? (Aubry et Rau, 5th ed. 4, p. 496; Baudry-Lacantinerie et Barde, 1, n. 60; Demolombe, 24, n. 96, and n. 101; Laurent, 15, n. 502; *Pand. franç.* vo. *Oblig.* n. 7158; Giorgi, *Obbligazioni*, IV, n. 67; and especially, Bufnoir, *Propriété et Contrat*, p. 598.)

A fourth reason may be added.

(4.) The Roman law did not require the error to be common. Dig. 18. 1. 45; Savigny, *System des heutigen Römischen Rechts*, 3, p. 293; Translation by Guenoux, 3, p. 308.)

But it must be admitted that there are strong practical considerations against setting aside a contract on the ground of the mistake of one party when the other party was perfectly innocent. Some French authorities dispute that this is the kind of mistake which the code contemplates. (Larombière, on art. 1110, n. 3; Troplong, *Vente*, 1, n. 15; Huc, 7, n. 25.)

And in spite of the arguments of most of the commentators, no case, so far as I am aware, can be found in which the court has annulled a contract on the ground of the mistake of one party where the other party was in absolute good faith, was unaware of the mistake, and was under no duty to make sure that no misunderstanding existed. An illustration is furnished

by an Egyptian case. The syndics of a bankrupt-estate compromised a claim which they had against a company in respect of a debt due to the bankrupt. The syndics believed that the debt was a chirographic debt whereas in truth it was secured by a hypothec. In an action by them against the company to annul the compromise on the ground of fraud and error it was held that fraud had not been proved. It was true that the company had not explained that the debt was secured, but they might have thought that this fact was known to the syndics. The court, however, annulled the contract on the ground of the unilateral mistake of the syndics. (C. A. Alex. 30 mars 1915, B. L. J. XXVII, 250.) But here the court considered there was a duty of disclosure. The reason why the reticence was not fraudulent was that it was not proved that the company knew the syndics to be mistaken as to the security. (Cf. Req. 12 janv. 1863, D. 63. 1. 302; cf. C. A. Alex. 19 mars 1913, B. L. J. XXV. 239.)

English law as to this.

In the English law the mistake must be mutual or the mistake of one party must be known to the other, and it must be understood on both sides that the contract is conditional on the existence of the supposed state of facts. The facts not being as supposed the basis of the agreement fails. (*Smith v. Hughes*, 1871, L. R. 6 Q. B. 597; 40 L. J. Q. B. 221. See Pollock, *Contracts*, 8th ed. p. 515; Anson, *Contracts*, 14th ed. p. 171; Leake, *Contracts*, 6th ed. p. 225. See, *infra*, p. 273.)

Mistake induced by other party.

From the case of a purely unilateral mistake we must distinguish the case where the error has been induced by the other party, and also the case where the other party, though he did not induce the mistake, was aware of its existence and chose to take advantage of it. Such conduct amounts to fraud, if, but for it, the other party would not have contracted. (Colmet de Santerre, 5th ed. 5, n. 16, *bis* III; *Pand. franç. Oblig.* n. 7156; *infra*, p. 274 and p. 315.)

But take a case where the other party is in perfect good faith. For example, I am a picture buyer, and I find in a dealer's shop an unsigned picture which I believe to be a Rembrandt. The dealer offers it as a picture by an unknown painter. I do not

communicate to him my opinion that it is a Rembrandt, because that might destroy my chance of getting a great bargain, and I buy the picture. Subsequently, I discover that my ascription of the work to Rembrandt was mistaken. Can I get the sale annulled on the ground of my mistake? Surely not. If the dealer had sold me a pair of silver-gilt candlesticks easily mistaken for gold, or a sham Etruscan vase, it would have been his duty to point out to me that the things were not what they seemed. (See Agen, 30 avril 1884, D. 87. 1. 105.)

But the picture was an unsigned work; it was not passed off as a Rembrandt, and he did not know that I believed it to be by that master. The true view of such a case seems to be that there is not any mistake on the part of the purchaser. He knows that he is making a speculation. In his opinion, to keep to the illustration, the picture is by Rembrandt, but whatever faith he may have in his own judgment, he knows he is not infallible. He decides to take the risk, and to get, probably for a low price, a picture which may turn out to be of considerable value. The principle to be applied is analogous to that applied in the case of a compromise. The party to the compromise may be mistaken as to the rights which he surrenders, but he prefers not to run the risk of an action, and he cannot get the compromise set aside on the ground of his mistake. So, here, the purchaser wants to get a valuable thing for a small price, and he takes the risk of his judgment as to its value being erroneous. When the fair inference from the facts is that the purchaser bought the thing for what it was, for better for worse, relying upon his own judgment, he cannot challenge the contract on the ground of mistake if his judgment turns out to have been wrong. (See Bruxelles, 8 nov. 1856, D. 57. 2. 110.)

The result of the French jurisprudence is to hold that contracts cannot be annulled on the ground of the mistake of one party unless this mistake is in regard to an element which was treated by both parties as a condition of the contract. (See Cass. 24 juin 1867, D. 67. 1. 249; Cass. 29 janv. 1896, D. 96. 1. 556.) The authors who maintain that as a matter of principle, we cannot make this limitation which is not made by the code, have to find some means of preventing the manifest injustice which might arise from the application of the rule that the mistake of one party is sufficient. If the purchaser seeks to get the contract set aside on the ground of a mistake of his, for which the vendor was in no way responsible and of which he was ignorant, then, at

any rate, the purchaser must make good to the vendor any loss which has been caused to him. If, to revert to the illustration, by buying the picture, I prevented the dealer from selling it to another purchaser, I must compensate him for this loss. (Colmet de Santerre, 5th ed. 5, n. 16, *bis* IV; Baudry-Lacantinerie et Barde, 1, n. 60; *Pand. franç. Oblig.* n. 7159.) But they are not agreed whether the damages are due for breach of contract or for fault. Most of them say the liability is for fault. In the case supposed it was a quasi-delict on the part of the purchaser not to ask the seller for more explanation. Laurent does not agree with this, and denies that in such a case there is anything in the nature of delictual fault. (15, n. 502.) M. Barde considers that we have here the special kind of fault to which Ihering has given the name *culpa in contrahendo*. (See as to this category of fault, *supra*, p. 189, and *infra*, p. 338.) The fault is not a breach of contract, but it arises out of the contract. By entering into the contract the purchaser undertook to guarantee the seller against any loss caused to him by the purchaser's fault in that connection. (Baudry-Lacantinerie et Barde, l.c.) The question is interesting but not very practical. It will in many cases be impossible for the purchaser to prove that he was in error, if he said nothing to the seller to indicate his state of mind. But where the conditions were not expressed, circumstances may be proved which entitle the court to infer that the seller knew of the purchaser's state of mind. In particular the price paid will be an important indication. If the purchaser has paid the price of real diamonds for diamonds made of paste, the court will hardly believe the seller if he says he was not aware of the purchaser's mistake. Questions of this kind as to mistake arise most frequently in contracts of sale, but the same principles apply, *mutatis mutandis*, to other contracts.

Mistake as to the person or as to a quality of the person.

The Egyptian Code says nothing about this, but it no doubt intends to preserve the French law that mistake as to the person is not a cause of nullity unless the principal cause of the contract was the consideration of this person. (C. C. F. 1110.) In many cases the identity of the person with whom one is contracting is immaterial. If I sell goods for cash to John under the impression that he is William the error is immaterial. But if I sell on credit relying upon William's reputation the error is essential.

A mistake as to the person may be a ground for annulling the contract in all cases where his identity is the principal reason for giving the consent. A man who marries a woman, or adopts a child, or makes a gratuitous loan or a gift, or goes into partnership with another, or gives a commission to an artist, can get the contract annulled if he shows that he was mistaken in the identity of the other party. (Baudry-Lacant. et Barde, 1, n. 62; Hue, 7, n. 27. See Cass. chambres réunies, 24 avr. 1862, D. 62, 1. 153. And in some cases, the error will be essential though it is not as to the identity of the person, but as to some quality of the person, provided that it was specially in view of this quality that the consent was given. For example, the character or the occupation of the other party may be an essential consideration.

In a French case a man sold his business as an *agent d'affaires*. It turned out later that the seller was an ex-convict who had been carrying on the business under an assumed name. It was held that the purchaser could annul the sale on the ground that the character of the seller was an important element in such a business. The continuance of the *clientèle* depended on the confidence of the public in him. (Aix, 21 déc. 1870, D. 71, 2. 79.) So, the character of the lessee of a house may injuriously affect the value of the property, and the lessor who was mistaken as to the occupation of the lessee may be entitled to get the lease annulled. (Dall. *Rép. Oblig.* n. 124.) It has been held in France that when the lessor let his house to a woman believing her to be of good character, and afterwards discovered that she was a *femme galante*, he could get the contract set aside. (Trib. Civ. de Nantes, 10 juill. 1894, Gaz. Pal. 94, 2. 176.) This decision has been criticised. (Baudry-Lacantinerie et Wahl, *Louage*, 3rd ed. 1, n. 55.) It seems, nevertheless, to be a correct application of the principle. The question here, as in other cases, is, would the party have given his consent if he had not been under the mistake as to the person? The French Code does not say the mistake as to the person must be a mistake as to identity in the literal sense.

So, also, in the contract of fire insurance. A mistake with regard to the profession of the assured may very well be essential, because in some businesses the risk of fire is much greater than in others. (D. N. C. C. art. 1110, n. 150. See *ib.* vol. 4, p. 869, and Req. 4 mai 1904, D. 1905, 5. 25.)

Mistake as to solvency of other party.

A mistake as to the solvency of the other party is not a cause of nullity unless his solvency was made a condition of the contract. (Req. 5 août 1874, D. 75. 1. 105, S. 75. 1. 366.) The seller who discovers that his purchaser has become insolvent or bankrupt has, subject to certain conditions, the right to retain the thing sold or to revindicate it. (See C. C. E. 281/353; N. Comm. C. 383; M. Comm. C. 398.) But he cannot get the sale annulled for mistake. To allow this would be to open a very wide door. A mistake as to solvency may be considered as a mistake of motive. The seller would not have made the contract if he had known the other party to be insolvent, but solvency is merely an accidental quality of a person.

Mistake as to quality of the person.

According to the prevailing view in France, a mistake as to the person, in order to be a cause of nullity, must be either a mistake as to the identity of the other party, or a mistake as to his civil personality, such as dealing with him as the heir of another when in fact he is not so. In addition, a mistake as to his occupation or profession may be essential as explained above, but a mistake as to his moral character, his talents, his fortune, his nationality, or religion, can never be a cause of nullity of contract. There are of course many cases in which a mistake of this kind is altogether immaterial. But there are other cases in which it is equally clear that but for the mistake the other party would not have contracted. Nevertheless, according to the *Cour de Cassation*, the contract cannot be annulled on the ground of the mistake.

The question if mistake as to the moral character of the other party can ever be essential has arisen almost exclusively as to marriage.

Mistake as to the person in the case of marriage.

It is obvious that in regard to marriage there are considerations which do not apply to other contracts. Marriage is indeed based upon the contract of the parties, but it is more than a contract, it is a status arising out of a contract. The French Code has a special article as to mistake as a ground of nullity of marriage: *Lorsqu'il y a eu erreur dans la personne, le mariage ne peut*

être attaqué que par celui des deux époux qui a été induit en erreur. (C. C. F. 180.)

As to the expression *erreur dans la personne*, there has been much controversy.

(1) Mistake as to identity.

It is agreed on all hands that a mistake with regard to the physical identity of the other party is a ground of nullity. Where there is personation, that is the substitution of one person for another, as when a man believes that he is going through the ceremony of marriage with a certain woman and when she lifts her veil he discovers that she is another woman, the mistake is essential. There is controversy here as to whether the marriage is voidable or void *ab initio*, but this subject belongs rather to the law of persons. (Demolombe, 3, n. 251; B. L. et Houques Fourcade, *Personnes*, 3, n. 1719; Aubry et Rau, 5th ed. 7, p. 97.)

(2) Mistake as to civil status.

It is likewise generally agreed that the mistake is essential if it is as to the civil status of the other party. For example, a woman believes she is marrying a man of a certain name and family whereas his papers of identity are forged and he is not entitled to the name which he bears. So in an old case the court annulled a marriage where a Spanish prisoner interned at Bourges had by the aid of false papers passed himself off as entitled to a civil status which was not his. (Bourges, 6 août 1827, S. 29. 2. 40, D. 29. 2. 72; D. *Rép.* vo. *Mariage*, n. 71.)

In another case a man produced a birth certificate and other papers showing that he was the *Comte de Toulouse Lautrec* and in that character induced the plaintiff to marry him. In fact he had no right to this name; the court annulled the marriage. (Paris, 12 mars 1903, D. 1903. 2. 191.) The French doctrine agrees that such a mistake is essential but only when the consideration of the civil status was the determining cause of the consent of the other to marry.

This was also the prevailing view of the Canon law on which the French law of marriage was based. It is thus expressed by M. Esmein: *L'erreur sur les qualités de la personne sera regardée comme suffisante pour annuler le mariage, toutes les fois que les qualités supposées auraient pour effet de donner au conjoint une individualité civile et sociale connue de l'autre conjoint, et autre*

que celle qui lui appartient en réalité. (*Mariage en Droit Canonique*, 1, p. 316.)

(3) Mistake as to moral qualities.

The prevailing opinion is that no mistake with regard to a quality of the other person, however important the mistake may be, is a ground for annulling the marriage. Pothier thus states the old French law on the point: *Si j'ai épousé Marie la croyant noble, quoiqu'elle soit de la plus basse roture, ou la croyant vertueuse, quoiqu'elle se fût prostituée, ou la croyant de bonne renommée, quoiqu'elle ait été flétrie par justice; dans tous ces cas, le mariage que j'ai contracté avec elle, ne laisse pas d'être valable nonobstant l'erreur dans laquelle j'ai été à son sujet.* (*Traité du Contrat de Mariage*, n. 310.)

This was the principle of the Canon law. (See Esmein, *Le Mariage en Droit Canonique*, 1, p. 313, and authorities cited.) There is every reason to believe that the French Code intended to preserve the traditional rule.

The *Cour de Cassation* gave effect to this rule in a strong case. A wife discovered after marriage that her husband was an ex-convict. It was held that she could not get the marriage annulled however clear it might be that she would not have entered into the marriage if she had known the real facts. (*Chambres réunies*, 24 avril 1862, D. 62. 1. 153.)

Huc argues that certain other attributes besides civil status, namely, nationality, religion, physical capacity for generation, and freedom from religious vows of chastity, are also qualities to be regarded as essential, and that a mistake with regard to one of them will be a ground of nullity. (2, n. 76.) Demolombe maintains that an error as to a quality of a person may be so serious and so essential that the court has power to consider it as an error *dans la personne*. (3, n. 253.) And there are one or two isolated decisions of the courts in this sense. The strongest case is that in which there has been a concealment of pregnancy. For example, it has been held *que l'erreur sur les qualités (autrement dit la personne morale) de l'un des époux peut motiver l'annulation du mariage, avec dommages-intérêts au profit de l'époux trompé, lorsqu'elle est telle, si grave, si essentielle, qu'elle est appréciée par les juges comme une erreur sur la personne même; qu'ainsi un mariage peut être annulé pour cause de dissimulation au futur d'un état de grossesse de la femme qui eût été*

pour lui un motif absolu de refuser son consentement, et qui a amené lorsqu'il l'a connu, une séparation de fait immédiate.
(Trib. Civ. Chaumont, 9 juin 1858. D. 61. 5. 305.)

But it is submitted that this decision, and the opinions of M. Hue and M. Demolombe, do not correctly express the French law. They are not in accordance with the old law upon the point and there is no reason to suppose that the French Code intended to innovate.

Rule in marriage stricter than in other contracts.

Although the traditional rule that no mistake as to the quality of a person can be a ground of nullity of marriage is well established in France it by no means follows that the rule should be equally strict in other contracts. We cannot say that in marriage a single quality of a consort is the determining cause which induces the other to consent to marriage. But in other contracts it is probably correct to say that where a quality of the party was the determining cause the mistake is essential. The cases above referred to in which a lease or an insurance policy has been annulled on the ground of a mistake with regard to the profession of the lessee or the assured appear to be in accordance with principles.

Mistake as to the person as a ground of nullity of marriage in English law.

In the English law it is only in the case of personation or when a person assumes a false name in order to conceal his identity from the party to whom he is about to be married that the marriage is annulled on the ground of mistake or fraud. (See *Moss v. Moss*, 1897, P. 263, 66 L. J. P. 154; *Rex v. Burton on Trent*, 1815. 3 M. & S. 537, 16 R. R. 350.) In particular, it has been held that ignorance of the pregnancy of a woman at marriage does not entitle the husband to have the marriage annulled. "The facts that a woman has been unchaste before marriage with a person or persons other than her husband, that she is in consequence pregnant at the time of her marriage, and that she has deliberately deceived her husband as to her previous conduct and present condition, do not constitute a ground on which the court can pronounce a decree of nullity of marriage." (*Moss v. Moss*, *ut supra*.) In that case some American decisions in the contrary sense are referred to.

And in a recent case the First Division of the Court of Session in Scotland has decided that when a man marries a woman in ignorance of the fact that she is at the time pregnant by another man he is entitled to decree of nullity. "The question is whether there exists any reason, arising either from the peculiar character of the marriage tie or from considerations of social policy, which makes it imperative to deny to the pursuer the relief to which the ordinary principles of contract law would otherwise entitle him. It is merely begging the question to say that in the case of marriage nothing short of a mistake as to the identity can be regarded as essential. The real question is whether a fraud of a peculiarly shocking character must necessarily be successful." (*A. B. v. C. D.*, 1914, 2 Scots Law Times, 107; *Juridical Review*, XXVI, 381.)

Modern codes as to mistake in regard to the person in marriage.

The Swiss Code admits two cases in which mistake as to a quality of the person is a ground for annulling a marriage. *Le mariage peut être attaqué par l'un des époux :*

(1) *Lorsqu'il a contracté mariage sous l'empire d'une erreur relative à des qualités si essentielles du conjoint, que leur défaut lui rend la vie commune insupportable.*

(2) *Lorsque le demandeur a été induit à dessein en une erreur décisive au sujet de l'honorabilité de son conjoint, soit par ce dernier, soit par un tiers de connivence avec lui* (arts. 124, 125).

The German Code is still more liberal. It makes the marriage voidable when the consort *a été induit en erreur sur la personne de l'autre époux, ou sur des qualités personnelles de celui-ci telles qu'il eût été détourné de contracter le mariage, s'il avait eu connaissance de l'état des choses et qu'il eût fait une appréciation raisonnable de l'essence du mariage* (art. 1333).

But in addition the German Code allows a marriage to be annulled on the ground of fraud if it determined the consent and this was reasonable in the circumstances and if it was not fraud in regard to the fortune of the other party (art. 1334).

The Morocco Code has a general article: *L'erreur portant sur la personne de l'une des parties ou sur sa qualité ne donne pas ouverture à résolution, sauf le cas où la personne ou sa qualité ont été l'une des causes déterminantes du consentement donné par l'autre partie.* (Code Maroc. Oblig. art. 42.)

Mistake as to the price or value.

It is a settled rule of the French law that a mistake as to the price or the value of the thing concerning which the contract is made is not a ground for annulling the contract. The mistake which the law recognises as sufficient must be a mistake with regard to the thing or some quality of the thing. A mistake as to the price cannot be of this nature. (Aubry et Rau, 5th ed. 4, p. 495; Demolombe, 24, n. 128; Paris, 9 nov. 1899, S. 1900. 2. 296.) Nor can a buyer succeed by alleging that the thing bought is worth so much less than he expected that the sale might be considered as a sale without an object. So in one case it was held: *La vente de pierres à extraire d'une carrière, faite à raison de leur valeur commerciale, n'est pas résoluble pour perte de la chose, s'il est constaté que les matériaux extraits peuvent être employés et ont une valeur marchande, si minime soit-elle.* (Cass. 12 juin 1901, D. 1903. 1. 349, and note.) And when the buyer of an office made an error as to the income which it might be expected to yield it was held that he could not annul the contract on the ground of mistake as to the substance. (Agen, 15 janv. 1889, D. 90. 2. 45.) And similarly, when a seller, by inadvertence, asks less than the market price for his goods he is still bound by his contract. He made no mistake as to the price offered and he accepted it. His mistake was in not discovering in time that he might have asked a higher price. In a Quebec case, where the defendant had sold ten boxes of goods for \$2.55 a box, and found out afterwards that the market price was \$4.25, he refused to deliver the goods. The plaintiff brought a revindication, and it was held that he was entitled to delivery of the goods, or, failing delivery, to their value at the price of \$4.25. (*Morriset v. Brochu*, 1884, 10 Quebec Law Reports, 104. Cf. Dall. Rép. Oblig. n. 136.) In an Egyptian case a *commissionnaire* sold in his own name a pearl which belonged to his principal. Owing to a mistake in his instructions, he sold it for a price lower than that which his principal had named. It was held by the Mixed Court of Appeal that the principal could not get the sale annulled. The legal question was just the same here as if the *commissionnaire* had been the owner of the pearl. The court had to decide whether his consent to the sale was vitiated by his mistake as to the price. If the *commissionnaire* had been an ordinary mandatary and he had exceeded his powers, the principal would not have been bound by what he had done. (C. C. E. 527/648.) But a *commission-*

naire or factor is in a different position from an ordinary agent. He acts in his own name, and in a question with third parties, he is regarded as being the owner of the goods. (N. Comm. Code, 82; M. Comm. Code, 86; C. A. Alex. 11 janv. 1906, B. L. J. XVII, 72. See C. A. Alex. 2 déc. 1903, B. L. J. XVI, 15; Lyon-Caen et Renault, *Traité de Droit Commercial*, 3, n. 481.) But the rule that mistake as to the price is unessential is liable to be misunderstood. It means that a mistake as to the value of the thing, the result of which is that a wrong price is fixed, will not be ground for annulling the contract.

It does not mean that a sale cannot be annulled when, for example, by mistake a wrong ticket has been placed upon the article. In such a case the seller never intended to sell *that article* at the price stated. And, further, a mistake in the method of arriving at the price may be a ground of nullity. This is illustrated by a curious case in which the Mixed Court of Appeal stated the rule thus: *L'erreur sur le prix qui n'est pas une cause de nullité de contrat lorsqu'elle ne porte que sur une différence relative, opère la nullité du consentement quand elle affecte dans une mesure excessive le prix, envisagé comme rapport principal du contrat.* (C. C. M. art. 194.) (C. A. Alex. 6 mai 1917, B. L. J. XXIX, 426.) That case related to a contract of affreightment. The shipper had agreed to pay at a certain rate by the ton or by the cubic space, at the choice of the shipowner. The shipowner demanded payment by cubic space. The difference between the price by the ton weight and the price by the cubic space was that the price by the cubic space was eight or nine times as great. The shipper of the goods had previously refused an offer by another carrier to carry the goods at one-fourth of the price for which he was now sued. The court held that it was impossible to believe that the shipper would have consented to leave to the owner the choice of calculating the freight either by ton weight or by the cubic metre, if he had realised that this meant paying eight or nine times as much again if the shipowner chose to calculate by space.

Mistake of one party as to the price known to the other party.

The rule that a mistake as to the price is not a ground for avoiding a contract would not apply in a case where the other party knew of the mistake. Where a person snaps at an offer which he perfectly well knows to have been made by mistake he

cannot hold the other to the contract. In an English case the defendant sent a written offer to sell property, and by mistake in adding up some figures wrote 1,100*l.* for 2,100*l.* On receiving the acceptance he detected the mistake, and at once wrote explaining it. It appeared that the plaintiff knew the real value of the property, and it was held that he could not hold the other to the bargain. In this case the offeror had kept the paper with the addition upon it, so that the proof of his mistake was made easy. (*Webster v. Cecil*, 1861, 30 Beavan, 62, 132 R. R. 185.) This would no doubt be the same in the French law. In such a case there is no real consent, and the mistake of the one party has not induced the other to contract. He was aware that the offer made to him did not convey the real intention of the proposer.

✓ Mistake as to motive.

A mistake as to some extraneous fact which induces one or both of the parties to enter into a contract is not a cause of nullity. Such a mistake is commonly spoken of as an error as to the motive. The reasons which induce parties to enter into a contract are infinitely various, and few contracts would be secure from attack if they could be annulled merely by proving that one of the parties would not have made the contract but for some misapprehension. If his mistake is as to the thing the parties are dealing about it may be a cause of nullity, but a mistake as to some outside fact can never be a sufficient ground for avoiding the contract. (*Aubry et Rau*, 5th ed. 4, p. 495; *Baudry-Lacantinerie et Barde*, 1, n. 71; *Pand. franç. Oblig.* n. 7147.) It may very well be that the party would not have made the contract if he had been aware of the real facts, but he does not make any mistake in the contract itself. If I buy a horse in the mistaken belief that one of my horses is dead I cannot get the sale set aside when I find that the report of its death was erroneous. It is true that I should not have entered into the contract at all but for the mistake, but I made no mistake in regard to the horse which I bought or any of its qualities, and that is the only kind of mistake upon which I could found as a reason for annulling the sale. (*Pothier, Oblig.* n. 20; *Loaré*, 12, p. 319; *Huc*, 7, n. 20. See *Cass.* 26 mai 1891, D. 91. 1. 352; *Cass.* 16 mars 1898, D. 98. 1. 301.) In a French case a married woman agreed to make a gift jointly with her husband. She believed that the money was to come out of the community. In reality it was to

come out of the *propres* of herself and her husband. It was held that she could not refuse to execute the contract. Her mistake as to the fund out of which the gift was to be made was merely a mistake as to an extraneous fact, or an error as to motive. (Paris, 12 juill. 1892, D. 93. 2. 509.)

There are two cases, however, in which a mistake as to an extraneous fact may be a cause of nullity. These are:—

(1.) When the parties expressly or tacitly make the contract conditional on the fact being as supposed. If, when I buy the horse, it is understood that the sale is conditional on the news of the death of my old horse being confirmed, I can get the sale annulled if the report was not true. (Authorities in preceding note, and Trib. Civ. de Lyon, 15 mars 1884, *joint à Lyon*, 10 févr. 1886, S. 87. 2. 179.)

(2.) When the mistake which impelled one party to contract was induced by the representations of the other party. In this case, however, the ground would be fraud and not mistake, and in such a case we are not concerned with the question whether the mistake is essential or not in the technical sense of that term. To revert to the illustration, if the vendor deceived me into believing that my horse was dead and thereby induced me to buy his horse, I can get the sale annulled. (*Pand. franç. Oblig.* n. 7156; Colmet de Santerre, 5, n. 16, *bis* 111.)

Clerical mistakes.

If the parties to a contract have come to a final agreement the contract cannot be annulled on the ground of clerical mistakes or mistakes of calculation which did not induce the consent. The court which interprets the contract has the duty to give effect to the common intention of the parties and can correct obvious mistakes. (See especially the *réquisitoires* de M. l'Avocat général Paul Fabre, D. 66. 1. 109; *Pand. franç. Oblig.* n. 8089.) One word or one figure may be written in mistake for another or a mistake of calculation may be made, but it may be clear, nevertheless, that the parties were in agreement. The clerical or mechanical mistake, designated in French as *erreur matérielle—erreur de plume*—or *erreur de calcul*—can be corrected; it does not affect the validity of the contract, and the party who might profit by it cannot object to the word or figure being restored to that which expressed the common intention. *Error in transcribendis verbis non nocet.* (Aubry et Rau, 5th ed. 4, p. 496;

Baudry-Lacantinerie et Barde, 1, n. 71; *Pand. franç. Oblig.* n. 7151; *D. Supp. Oblig.* n. 43; *D. N. C. C.* art. 1110, n. 172.) The Swiss Federal Code of Obligations has an express article to this effect. *De simples erreurs de calcul n'infirmant pas la validité du contrat; elles doivent être corrigées* (art. 24).

Proof of clerical mistake.

It is often possible to correct the mistake by reference to the documents themselves which contain the contract. The word or figure which is wrongly given in one place is correctly stated in another, or there are terms used or calculations stated on the face of the writings by which the clerical mistake in one place can be corrected. But when it is not possible to correct the mistake from anything which appears upon the face of the documents, and the contract is one which can be proved only by writing, is it competent to prove the mistake by witnesses? There is a controversy upon this point in France. Some writers contend that such proof is excluded by the article which prohibits proof by witnesses *contre et outre le contenu aux actes*. (Baudry-Lacantinerie et Barde, 4, n. 2571; *C. C. F.* 1341.) But the better opinion appears to be that such proof should be admitted. Such evidence is not tendered to contradict the deed, but to rectify it and bring it into accordance with the real intention of the parties, and it is to prove a fact of which the parties could not have procured proof by writing. (Demolombe, 30, n. 90; Bonnier, *Preuves*, n. 143; *D. Supp. Oblig.* n. 1941.) The jurisprudence is in this sense. (Cass. 23 avril 1860, *D.* 60. 1. 228; Req. 19 janv. 1870, *D.* 70. 1. 302, *S.* 71. 1. 97; Pau, 21 mars 1887, *D.* 87. 2. 159.)

In Egypt it is easier to reach the same conclusion because there is no article which expressly forbids proof by witnesses contrary to the written document which contains the contract. The jurisprudence accepts the general principle of the French law which prohibits such proof. (C. A. Alex. 2 janv. 1908, *B. L. J.* XX, 46.) But in accepting the principle, it is reasonable to suppose that it accepts it subject to the limitations placed upon it by the French jurisprudence.

Illustrations of the rule that clerical mistakes do not invalidate contracts.

A vendor offers a quantity of wood 30 *centimètres* thick. The purchaser writes accepting the offer, but, in his letter enumerating the conditions, he writes 32 *centimètres*. The purchaser, however, declares himself quite satisfied, and the vendor must have known that the figure 32 instead of 30 was a mere slip of the pen. If he had any doubt upon the point he could have telegraphed or written. Instead of doing so, however, he refused to deliver the wood, probably because he had received a better offer in the meantime. It was held the purchaser was entitled to delivery. (Cass. 5 déc. 1876, D. 77. 1. 179.)

In another case a commercial traveller sold a quantity of coffee *sous l'approbation de la maison*. He gave the purchaser a note of the sale stating the price at 255 francs for a *demi-farde* of coffee. The market price of coffee at that time was 355 francs, and the commercial traveller's employer, in confirming the sale, stated the price at 355 francs. To this the buyer did not reply, but subsequently he wrote disclaiming his liability on the ground that he had agreed to pay only 255 francs. It was held he was liable for the price at the rate of 355 francs, the court being satisfied that the figure 255 in the traveller's note was a mere clerical error which had not misled the purchaser. (Rouen, 19 mars 1902, D. 1903. 2. 109.)

Mistake of law.

Both the Egyptian and the French Codes speak of "mistake" simply, and say nothing about mistake of law, and the question at once arises whether in order that a mistake should be a cause of nullity of consent it must be a mistake of fact. But it is a settled rule of the French law that this is not so. (Aubry et Rau, 5th ed. 4, p. 496; Baudry-Lacantinerie et Barde, 1. n. 69; Agen, 17 mai 1887, *sous* Req. 28 mai 1888, D. 89. 1. 315; D. N. C. C. art. 1110, n. 82. See article by M. G. Dereux, Rev. Trim. 1907, p. 513.) The arguments in favour of this view are convincing, and they apply equally in the Egyptian law.

But before stating them we must clear up an ambiguity in the expression "mistake of law." That term is used in two distinct senses. When a court of appeal reverses the judgment of the court below it may say that it does so on the ground that the

inferior court has fallen into a mistake of law. For example, when a clause of penalty has been stipulated in the event of breach of a contract, and the contract has been broken, but it is proved that the breach has not caused any damage, the Mixed Courts hold that the penalty cannot be recovered. (Trib. Civ. Alex. 22 févr. 1913, Gaz. Trib. 3, n. 218.) And the Mixed Court of Appeal would reverse the judgment of a lower court which held the contrary on the ground that this was a mistake of law. But, after all, the law upon this point is a matter of opinion, and many authorities do not agree with the view adopted by the Mixed Courts. The Native Court of Appeal thinks otherwise. (C. A. 20 Feb. 1911, O. B. XII, n. 69. See *infra*, 2, p. 397.) Now, if the party to a contract is induced to enter into it because he prefers the opinion of the Native Courts to that of the Mixed Courts, he could not get his contract annulled for mistake of law. The view which he has chosen to act upon is considered erroneous by some authorities and sound by others, and the courts which for the moment support one view of the matter are liable to change their minds.

But there are many rules of law about which no controversy is possible. If the code says, for example, that one neighbour shall not be entitled to have a direct view over the land of another at a less distance than one metre there is no room for dispute. (C. C. E. 39 61.) It is a legal fact as certain as any physical fact, such as that water boils at 100 degrees centigrade. Or, if the law says that the owner of building materials which have been used by another for a building without his consent cannot pull down the building in order to remove the materials, we must take this for a fact. (C. C. E. 64.) It is when a man is induced to contract owing to a mistake as to one of these legal facts that he can get his contract annulled. A mistake as to a fact of law has the same effect as a mistake as to any other fact. The principal arguments are:—

1.) There is no reason in principle for making any distinction. The man who makes a contract owing to a mistake of law is entitled to be protected as much as he who contracts under a mistake of fact, provided always that but for the mistake of law he would not have given his consent.

2.) If the code had meant to distinguish between mistake of law and mistake of fact it would have done so, whereas it speaks of mistake without any qualification. This argument is strengthened by the fact that in two cases the French Code does

draw the distinction between mistake of fact and mistake of law. It says a compromise cannot be attacked on the ground of mistake of law. (C. C. F. 2052.) And the Egyptian codes say a compromise can be impugned on the ground of material mistake as to *person or thing*. (C. C. E. 535/657. See *infra*, p. 255.) And the French Code says a judicial admission cannot be revoked on the ground of a mistake of law. (C. C. F. 1356.) The Egyptian Code, however, is silent upon this point. (C. C. E. 233/298. It would have been unnecessary for the code to say anything about mistake of law in these articles if mistake of law had not been a cause of nullity in other contracts. It is a fair argument *a contrario* that the rule stated as to compromise and judicial admissions is intended to create exceptions to the general principle, which is that error of law and error of fact produce the same legal effect. (Larombière, art. 1110, nos. 22, 25 and 26.)

Against these arguments it is contended that according to principle, ignorance of the law is no excuse. But the old maxim *ignorantia juris neminem excusat* is not laid down in the Civil Code, and has no application in civil matters. It is a sound rule in criminal law, because wrongdoers would easily evade punishment if it were necessary to prove their knowledge of the law which they had broken. And some writers in France maintain that even in criminal matters the accused is entitled to be acquitted if he proves that he was ignorant of the law, and that his ignorance was inevitable, as, for example, when the act with which he is charged has been made criminal by a law of which he could not possibly have heard. (See Garraud, *Traité de Droit pénal*, 2nd ed. 1, p. 557; Rev. Trim. 1907, p. 532. See on the application of this principle in England, Salmond, *Jurisprudence*, 5th ed. p. 368.) But however this may be, the maxim does not apply in civil cases. (Laurent, 15, n. 506; *Pand. franç. Oblig.* n. 7163. See Cass. 28 mai 1888, D. 89. 1. 315.)

What kind of mistake of law is a cause of nullity?

In order to succeed in getting his contract annulled upon this ground the plaintiff must show that, owing to a mistake as to the law, he gave his consent to the contract. It may be that he renounced a right which the law gave him, being ignorant of this fact, or, in consequence of his ignorance, he admitted another to a right to which he was not entitled. But he must prove that the erroneous belief was the sole determining cause of his consent.

The parties to contracts are frequently very ignorant of the law, but unless the mistake was the *motif principal et déterminant de l'engagement* the court will not set the contract aside. (Cass. 16 mars 1898, D. 98. 1. 301.) And certainly where both the parties to the contract know that there is a controversy among legal authorities with regard to a certain question, and they adopt for the purposes of their contract one opinion in preference to another, the fact that the opinion which they adopt is subsequently declared to be erroneous will not be a ground for setting aside the contract. If, for example, an employer of labour is doubtful whether a statute making employers of certain classes liable for accidents to their workmen applies to him, he may insure himself against the risk of such liability, and, although the courts should ultimately hold that as a matter of fact he did not fall under the statute, he cannot claim to have the contract of assurance set aside on the ground of his error of law. (Aix, 8 avril 1906, D. 1909. 2. 366. See *Pand. franç.* vo. *Oblig.* nos. 7177, 7182. Cf., in Quebec, *De Hertel v. Roe*, 1892, R. J. Q. 1 S. C. 427.)

It was precisely because he was not sure of the law that he preferred to insure himself against this risk. Nor again, if a document is ambiguous, and a person, interested under it, puts a certain construction on the document and acts according to this interpretation, he cannot get his contract set aside. The construction which he has placed upon the document may or may not be erroneous, but he has voluntarily chosen to adopt a certain view of the matter. In a French case a will was expressed in such ambiguous terms that it was not clear if A was intended to have the usufruct of the estate or to have the ownership of it, subject to a trust—*fidéicommiss de résidu*. A, in various deeds relating to the succession, such as the *procès verbal* of removal of seals, and the claim for delivery of a legacy, described herself as usufructuary. Subsequently she claimed that she was proprietor subject to a trust. It was held that there was no error here either of fact or of law, and that she was barred by her conduct from claiming the character of owner. She had voluntarily renounced her right to raise this question, and the other party could plead her renunciation as a *fin de non-recevoir*. (Cass. 4 juill. 1888, D. 89. 1. 143.) The most common case in which error of law is pleaded is when there has been a payment made in the erroneous belief that there was a legal debt. The right to repetition in this case belongs to the law of quasi-contracts, but it may be

observed here that when the payment was made in error it is immaterial whether the mistake was a mistake of law or a mistake of fact. The Quebec Code says so expressly. (C. C. Q. 1047.) The French and Egyptian law is undoubtedly the same. (Aubry et Rau, 4th ed. 4, p. 729; Larombière, art. 1376, n. 32; D. N. C. C. art. 1376, n. 165.) The man who pays taxes which are unlawfully levied pays under a mistake of law, but he is as much entitled to recover what he has paid as if the mistake had been a mistake of fact. (See C. A. Alex. 20 févr. 1913, B. L. J. XXV, 187.)

The action for repetition is not an action for the setting aside of a contract, but the fact that it is allowed equally for error of law as for error of fact confirms the view that when a mistake is founded upon as a ground of nullity it does not matter whether it was a mistake of fact or a mistake of law. The French jurisprudence is in this sense. For instance, in one case certain heirs by a deed undertook to deliver to co-heirs their legacies by preference and with an exemption from "return" or *rapport*. They were ignorant of the important principle of the French law, as it was before 1898, that if a testator had left a legacy to one of his heirs and did not say that he was to take it in addition to his share, the legacy has to be deducted from his share. This was an error of law and the deed was annulled. (Cass. 28 mai 1888, D. 89. 1. 315.) In a Quebec case a woman was informed that a will that she had made was invalid because her signature was illegible. Upon this representation she made a second will. It was held that this was an error in law and that the second will must be set aside and the first will allowed to stand. (*Lamoureux v. Craig*, 1912, R. J. Q. 42 S. C. 385.)

Error of law not a ground for setting aside a compromise.

As to this the Egyptian codes say:—"A compromise can be impugned only on the ground of fraud, material mistake as to person or thing, or forgery, discovered after the compromise, of the documents upon which the compromise was made." (C. C. E. 535/657.)

The French Code and the Code of Quebec say expressly that a compromise cannot be set aside on the ground of error of law. (C. C. F. 2052; C. C. Q. 1921.) And there is no doubt the Egyptian Code means the same, or it would not qualify the word "mistake" by adding "as to person or thing." There is a very

good reason why an error of law should not be a ground for setting aside a compromise. In a compromise both parties abandon certain legal claims upon the terms to which they have agreed. Each of them may think that the other has a good claim. At any rate, he thinks his adversary's claim so good that, rather than run the hazard of litigation, he would prefer to pay something to induce his adversary to abandon it. He may afterwards discover that his opponent's claim has no legal justification, but this will not enable him to get the transaction annulled. To hold otherwise would be to render every compromise merely provisional and uncertain. For, if there is a legal question between the parties, it cannot be that they are both right. The legal right must exist in favour of one of them, and not of the other. But it is because the ascertainment of this legal right is expensive and difficult that the parties prefer to settle their claims amicably. Each of them in surrendering his claim, knows that he may be surrendering the legal right and that his adversary may have no right at all. But he is not sure of this, and he thinks that half a loaf is better than no bread. There is an aleatory element in every compromise. Each of the parties surrenders the possibility of a larger gain for the certainty of a smaller gain. There seems, therefore, a good reason for not allowing compromises to be upset upon the ground of error of law. If I surrender a right knowing it to be uncertain, this is not, strictly speaking, a mistake of law. I know that the right may exist in my favour, and I weigh that possibility in fixing the terms of the compromise.

M. Planiol, it is true, thinks there is no strong reason why the ordinary rule as to mistake should not have been applied by the code to compromises. *Il n'y avait cependant pas de raison bien décisive pour déroger au droit commun.* (2, n. 2300.) But the statement of Larombière appears to be more correct when he says of transactions: *Il est donc de leur essence même de ne pouvoir être attaquées sous prétexte d'erreur de droit* (art. 1110, n. 26). If two persons each claim to be the sole heir of a deceased person they may agree, instead of litigating as to their rights, to divide the succession. It is certain that as matter of law one only was the heir and that the other accordingly gave up no right which he really possessed. But although this may be demonstrated afterwards the parties must stand by the compromise which they have made. Even error of fact is not always a cause of nullity of compromises. It is not such a cause if the intention of the parties was to come to a general settlement of all the matters in

dispute between them without resorting to litigation in order to determine the various points of fact or of law upon which their rights might depend. In such a case there is no presumption that if there had been no mistake the compromise would not have taken place all the same. But when the mistake is as to a fact not included in the compromise and is of such a character that it must be considered as the determining motive of either of the parties in entering into the agreement, its existence is regarded as a condition implied though not expressed, and then if the fact fails, the foundation of the agreement fails. (See *Trigge v. Lavallée*, 1862, 15 Moore, P. C. 270, 137 R. R. 61, a Quebec case.) So also when the compromise is as to a single object, and, after the compromise, a document is discovered which shows that one of the parties had no right whatever, this is a mistake of fact for which the compromise can be annulled. (C. C. F. 2057; C. C. Q. 1925.) But for the erroneous belief that there was a plausible claim to abandon no compromise would ever have been made. And the same rule applies when unknown to the parties the question between them has been decided by a judgment which has become *chose jugée*. (C. C. F. 2056; C. C. Q. 1924.)

Mistakes which are not essential.

Mistakes of any kind other than those which have been mentioned do not affect the validity of the contract. The general principle is that a mistake is not essential if it appears that the party would have made the contract although he had been aware of the real facts relating to the thing. A mistake as to some accessory quality of the thing will not invalidate the contract, unless in the particular case this quality had been made essential. It is not necessary to multiply illustrations because each case turns upon its particular facts. (See *Nancy*, 15 mai 1869, S. 69. 2. 179; *Journal du Palais*, 69, p. 830, advertisements of property for sale, the property being described in glowing terms; *Trib. civ. Seine*, 3 août 1897, D. 98. 2. 51, mistake as to solvency of insurance company; *Req.* 5 août 1875, S. 75. 1. 366; *Journal du Palais*, 75, p. 882, sale of land without stating that the subsoil had been removed and the ground filled up again; *Trib. Civ. de Muret*, 1886, *sous Toulouse*, S. 90. 2. 61, addition of sugar to wine; *Baudry-Lacantinerie et Barde*, 1, n. 71.) We have seen that a mistake as to the material of which a thing is made is not necessarily essential, though in many cases it will be so. And,

a fortiori, when the mistake is with regard to the material of some minor part of the thing it may very well be that this does not invalidate the contract. In an Egyptian case a necklace was sold as being set in gold and silver, and with it an *aigrette* set in gold. It turned out that the pin of the *aigrette* was silver-gilt, but it was held that the mistake upon this point was not essential. The pin was a relatively unimportant part of the thing sold. It had not been mentioned at all in the contract, and there was nothing to show that the parties had contemplated its genuineness as an essential condition. (C. A. Alex. 1 déc. 1904, B. L. J. XVII, 28.) Upon the same principle, as we have seen, mistakes as to the person with whom the contract was made are not essential, unless his identity or his possession of some quality was expressly, or tacitly made a condition of the contract. We have seen also that clerical mistakes do not invalidate the contract unless they induced the consent. In the preceding cases the reason why the mistake is not essential is simply because the party would presumably have made the contract if he had not been under the mistake. But there are some classes of mistakes as to which this test is not sufficient. It has been explained that mistakes as to the value or price of the thing, and mistakes as to the motive do not invalidate the contract, although here the party under the mistake might not have made the contract but for the mistake. A mistake as to the price or value of the thing may cause lesion, and lesion is not in the French or in the Egyptian law a cause of nullity of contracts. (In the French law a minor can get a contract set aside for lesion. (C. C. F. 1305.) But in the Egyptian law, even in the case of a minor, lesion itself is never a ground of nullity, though in the case of the sale of immoveables a minor has, subject to certain conditions, an action for supplement of price. (C. C. E. 336/419; C. A. Alex. 4 janv. 1900, B. L. J. XII, 68.) According to the Mixed Courts persons under an interdiction have the same right. (C. A. Alex. 10 avril 1889, B. L. J. I, 115.) Even minors have no such remedy in the case of the sale of moveables. (C. C. E. 336/419. See C. A. Alex. 11 janv. 1905, B. L. J. XVII, 73.) Further, a mistake as to motives does not invalidate the contract, although, but for the mistake, the party would not have consented. We have explained what is meant by the traditional but not very happy expression mistake as to motive. Among such mistakes, according to the French jurisprudence, must be included a mistake as to the solvency of the other party.

Proof of mistake.

The *onus* of proving the mistake lies upon the party who alleges it; it is never presumed. (Cass. 2 mars 1881, D. 82. 1. 199; Cass. 5 févr. 1894, D. 94. 1. 134.) The rule in case of doubt is *error nocet erranti*. But here, as in the case of fraud or violence, the nature of the proof required will depend greatly on the circumstances. It will be easier to prove mistake on the part of an inexperienced or uneducated person. And the bodily or mental health, the extreme youth, or extreme age of the party alleging error will be important elements for consideration.

Effects of nullity on the ground of error.

The party to a contract who succeeds in getting it annulled on the ground of his error may thereby cause a loss to the other party. And, according to the French law, in this case he will in certain circumstances be liable in damages. This will certainly be so when the party who suffered the loss was in good faith, and the mistake of the other party was due to his own negligence. (D. *Supp. Oblig.* n. 49.) But is there any liability when there is no negligence? According to some writers there is. We have here what Ihering calls *culpa in contrahendo*. (*Gesammelte Aufsätze*, I, p. 327, in French transl. *Œuvres choisies*, II, p. 1. *Sic*, Demolombe, 24, n. 103; Aubry et Rau, 5th ed. 4, p. 497. See *supra*, p. 188, and *infra*, p. 338; B.-L. et Barde, 1, n. 60, and n. 362. Cf. Leonhard, R., *Der B. L. et Barde*, 1, n. 60, and n. 362. Cf. Leonhard, R., *Der Irrthum bei nightigen Verträgen*; Broek, W., *Das negative Vertragsinteresse*.)

The loss caused by the other party is due to the act of the plaintiff if not to his fault. It may well be doubted whether this is a sound view. The rule that there is no liability without fault is a fundamental principle of the French law. (See Bufnoir, *Propriété et Contrat*, pp. 595 *seq.*; Amiens, 11 mai 1854, D. 59. 2. 147; D. N. C. C. art. 1110, n. 186.)

This question generally arises when there has been a mistake in the transmission of an offer or of an acceptance.

In the leading French case a merchant by a telegram authorised one of his correspondents to sell certain merchandise at the minimum price of 165 francs. The telegram, as received by the mandatary, read 139 francs, and, in consequence, the mandatary

sold the merchandise at 140 francs. An action by the vendor to have the sale declared null for want of consent was sustained by the Court of Amiens. (Amiens, 11 mai 1854, *ut supra*.) But in such a case if damage is suffered by the receiver of the telegram is the sender liable in damages? The Court of Amiens held that there was no such liability. (Cf. Bordeaux, 28 mai 1856, D. 56. 2. 219.)

There is, however, considerable French authority in the opposite sense. (Paris, 11 janv. 1858, D. *Rép.* vo. *Télégraphie*, n. 89; Lyon-Caen et Renault, *Traité de Droit Commercial*, 3. n. 23. See Valéry, *Contrats par Correspondance*, n. 384.)

The principal arguments in support of this view are:—

(1) That in choosing to transmit the declaration of his will by telegraph the sender voluntarily chooses a means in which he knows that errors may very possibly be made. Various modes of communication were open to him and he has chosen to select a risky one. There is a *culpa in eligendo*. (Ihering, *Leures Choiesies*, 2, pp. 75, 95.) But considering the rapidity with which business has to be conducted, and the universal usage of employing the telegraph, it seems very difficult to maintain that a business man commits any fault, however slight, in choosing this means of communication. If it is the duty of the sender of a telegram to make absolutely certain that it is sent in a correct form, why is it not equally the duty of the receiver of the message to make sure that it reaches him correctly? It is within his power to get the message repeated, or he can wait for confirmation by letter from the sender. On the whole, there seems very little force in the argument that there is any *culpa in eligendo* in this case. It has been suggested that the sender might have the telegram repeated, or registered, as can be done in France. But the Court of Amiens decided that there was no fault in the sender not having employed *le moyen peu usité de la recommandation de la dépêche*.

(2) That the sender of a telegram guarantees the exact transmission of the message. He knows that the method of communication which he has selected is a faulty one, and that, owing to its choice, mistakes may occur which may cause loss to the receiver of the message. He must, accordingly, be taken to have guaranteed by implication that he would make good any loss thus sustained. (Ihering, *op. cit.* 75, 95.) Windscheid formerly supported this theory but has abandoned it in later editions. (*Pandekten*, 8th ed. 2. s. 307, note 5. There does not seem.

however, to be the slightest reason for assuming that the sender intends to enter into any such guarantee, and unless the law makes him liable, he cannot be made liable on the ground of an assumption so improbable as this.

(3) It has been maintained that the post office or telegraph company to which the sender entrusts the message is the mandatary or *préposé* of the sender, and that the mandator is liable for a mistake made by the mandatary in carrying out the mandate. The answer to this is that the department of government or the company which undertakes the business of transmitting messages is not the *préposé* of the senders of the messages. A *préposé* or a mandatary is a person freely chosen and whose conduct the other party has the right to control. (Sourdat, *Résponsabilité*, 2, n. 887.) But in this case there is, as a rule, no choice at all, some one agency having a monopoly of the right to transmit telegrams, and, at any rate, the sender has no control at all over the method of dispatch. The contract which he makes is much more analogous to a contract made with a railway company or other common carrier. It is a contract of *louage d'ouvrage* and not of mandate or *louage de services*. (Valéry, *Contrats par Correspondance*, n. 388; Thaller, *Traité Élémentaire de Droit Commercial*, 4th ed. p. 513, note 1.)

The sender of goods who gives them into the hands of a common carrier is not liable in damages to the person to whom the goods were sent unless he has guaranteed their safe carriage. Why should the rule be different in the case of a message handed in to be telegraphed? No satisfactory answer can be given; and the arguments of Ihering and others are unconvincing. But even if we could regard the telegraph company or telegraph administration as a mandatary the result would be the same. According to the principles of mandate the mandator is bound to execute the engagements contracted by the mandatary in virtue of the mandate, as the Egyptian Code expresses it, or *conformément au pouvoir qui lui a été donné*, in the language of the French Code. (C. C. E. 527, 648; C. C. F. 1998.) The Quebec Code states the same rule thus: "The mandator is bound in favour of third persons for all the acts of his mandatary, done in execution and within the powers of the mandate." (C. C. Q. 1727.) The mandator, it is true, may be also liable to third parties if the mandate was expressed in such careless terms as to make it easy for the mandatary to deceive third parties as to the extent of his powers. (Paris, 25 mars 1892, D. 92. 2. 263.)

But here we have nothing of this kind. The sender of the telegram, if he is to be considered as a mandator, certainly did not give a mandate to the telegraph administration to make a mistake in the transmission of the telegram. (Valéry, *Contrats par Correspondance*, n. 388.) And there is, *ex hypothesi*, no negligence on the part of the sender of the telegram.

The fact is there is no solid legal foundation for the theory. If the sender of the telegram was free from negligence, the mistake made in its transmission, is, as regards him, a fortuitous event, for which he is not responsible. *Nemo casum præstat*. If the mistake in transmission is due to the negligence of the party to the contract he will be liable, but otherwise the loss will lie where it falls. (Valéry, *Contrats par Correspondance*, nos. 379 *seq.*)

Comparison with other laws.

The Swiss Code of Obligations makes a compromise. It requires fault to create liability, but it assimilates the mistake of the transmitter to the mistake of the party. *La partie qui invoque son erreur pour se soustraire à l'effet du contrat est tenue de réparer le dommage résultant de l'invalidité de la convention si l'erreur provient de sa propre faute, à moins que l'autre partie n'ait connu ou dû connaître l'erreur.*

Le juge peut, si l'équité l'exige, allouer des dommages-intérêts plus considérables à la partie lésée.

Les règles concernant l'erreur s'appliquent par analogie, lorsque la volonté d'une des parties a été inexactement transmise par un messenger ou quelque autre intermédiaire. (Code Féd. Oblig. arts. 26, 27; Rossel et Mentha, *Droit Civil Suisse*, 3. p. 55.)

The English law refuses to make the sender liable for the mistake of the telegraph clerk. (*Henkel v. Pope*, 1870, L. R. 6 Ex. 7, 40 L. J. Ex. 15. Cf. *Verdin v. Robertson*, 10 Macpherson, 35, Scots case.) There are some American cases in which the theory of *culpa in contrahendo*, or something like it, has been applied, and where it has been held that as between the sender and receiver of telegrams, the person who selects the telegraph as a means of communication, must bear any loss occasioned by errors in transmission on the part of the telegraph company. But there are other decisions in the opposite sense. (See Pollock, *Contracts*, 3rd American ed. p. 604; Beven, *Negligence*, 3rd ed. 2, p. 1122.) The Morocco Code of Obligations might be more clearly expressed, but it seems to mean that the sender is not responsible

except for his own fault. *En cas d'erreur, d'altération ou de retard dans la transcription d'un télégramme, on applique les principes généraux relatifs à la faute; l'expéditeur d'un télégramme est présumé exempt de faute, s'il a eu soin de faire collationner ou recommander le télégramme selon les règlements télégraphiques* (art. 430. Cf. art. 45). By the German Code the sender is liable without fault (arts. 120, 122. See Saleilles, *Déclaration de Volonté*, p. 39; *infra*, p. 283). In many cases, at any rate, it is possible to establish that there was negligence on the part either of the sender or of the receiver. In a German case Oppenheimer, a banker at Cologne, telegraphed to Weiler, a banker at Frankfort. "Buy (*erkaufen Sie*) one hundred shares in such and such a company." The message as delivered read "Sell (*verkaufen Sie*)."¹ Weiler sold the shares, and had to buy them back elsewhere because Oppenheimer refused to acknowledge that he had given any mandate to sell them. The price of the shares had gone up by that time and Weiler had to pay more for them. Consequently he suffered damage and he sued Oppenheimer for reparation. The court of Cologne held that Oppenheimer was liable on the theory of *culpa in contrahendo* without proof of negligence. But a sounder reason would appear to be that knowing the similarity between the words *erkaufen* and *verkaufen* the sender of the message should have taken care to prevent the possibility of such a mistake by employing some other terms. (See Ihering, *Œuvres Choiesies*, 2, n. 3, p. 7, and n. 40, p. 95.)

In another case an order was sent by telegram for 500 kilogrammes of goods. The message, as delivered, read 5,000 kilogrammes, and 5,000 kilogrammes were despatched. The purchaser refused to take delivery, and the vendor brought an action against him for damages. The Court of Charleroi found that the purchaser was liable, and gave as one of its reasons that there was negligence on his part in not stating the quantity required in words instead of in figures. (Charleroi, 22 févr. 1875; *Pasicrisie Belge*, 75. 3. 221; *Journal de Droit International Privé*, 2, 1875, p. 309.)

There are other cases in which the facts sufficiently indicate negligence on the part of the receiver of the message. The message may be of such a kind that it ought to have excited his suspicion and put him upon his inquiry. If a customer who has been in the habit of ordering goods at the rate of ten or twelve pounds weight at one time, were suddenly to send an order for

ten or twelve tons, or a man who has usually ordered a thousand cigars—*mille*—suddenly orders a million—*million*—the merchant would not be entitled to act upon such an order without making sure that the message had been correctly transmitted. (Thering, *op. cit.* p. 74.) Perhaps an American case falls under this principle. A dealer in New York received a telegram from one of his correspondents in these terms: "Are we to send the salt which you have bought by steam or by sail?" He replied by telegram "Ship by sail." By mistake the telegraph clerk wrote "rail," and the salt was sent at much greater expense by train. Perhaps here the loss should have fallen upon the receiver of the telegram in which the mistake was made. The similarity of the two words "sail" and "rail," coupled with the fact that salt was usually sent to this correspondent by water ought to have put him on his guard, and prevented him sending the salt by train until he had made sure that this was intended. It may be remarked that there was nothing in the use of the word "ship" to excite his suspicion, as that term is commonly used in America in the sense of "send." (See Valéry, *Contrats par Correspondance*, n. 397.) M. Valéry falls into the very natural mistake of supposing that the use of the word "ship" was enough to put the receiver upon his inquiry, seeing that it is an inappropriate term to apply to land transport. But "ship by rail" is a common American expression, just as French-Canadian tramway conductors call on passengers to *embarquer*. When it is impossible to discover any negligence on the part of the sender of a telegram or of the receiver, the loss should lie where it falls. There is no legal ground upon which we can fix either of the parties with liability. It may be worth while giving two or three examples of such a mistake where it is impossible to impute fault to either the sender or the receiver of the message.

A telegram ordering goods was addressed to *Melle*; there is a small town of that name in France, but the telegraph operator took *Melle* to be an abbreviation for *Marseille*, and sent the message there. The message eventually reached *Melle*, but in the meantime, the orderer of the goods, having received no reply, had bought them elsewhere. It was held he was not liable in damages. (Trib. Consulaire de la Seine, 12 déc. 1862, given by Valéry, *op. cit.* n. 398. Cf. Trib. Comm. Anvers, 20 mars 1876; *Journal du Droit International Privé*, 3, 1876, p. 487.)

The plaintiff and the defendant had been negotiating about the sale of fifty rifles. The defendant wrote a message ordering

three rifles. The telegraph clerk telegraphed the word "the" for "three." The defendant declined to take more than three rifles, and an action was brought by the plaintiff to recover the price of fifty. It was held that the defendant was liable only for the price of three. (*Henkel v. Pape*, 1870, L. R. 6 Ex. 7, 40 L. J. Ex. 15.)

A man sent a telegram to a florist ordering two "hand bouquets." The telegraph operator thought "hand" was "hund.," an abbreviation for "hundred." The florist sent two hundred bouquets. The action was against the telegraph company for damages, but it was taken for granted that the sender of the message was liable for two bouquets only. (*New York and Washington Telegraph Co. v. Dryburg*, 1860, 35 Penn. St. 298; *Bigelow's Cases on Torts*, p. 450.)

Liability of telegraph company for mistakes.

The question whether the telegraph company can be made liable for mistakes of transmission belongs to the law of responsibility.

In France, by art. 6 of the *Loi du 9 nov. 1850, l'état n'est soumis à aucune responsabilité à raison du service de la correspondance privée par la voie télégraphique*. (See Valéry, *Contrats par Correspondance*, n. 380; Sourdat, *Responsabilité*, 5th ed. 2, n. 1321; Dalloz, *Code des Lois Administratives Annotées*, 4, II. vo. *Comptabilité Publique*, nos. 9945 seq., 9990 seq., and 5, vo. *Postes et Télégraphes*, n. 2302.) In Egypt the telegraph department declines any responsibility for delays, errors, non-transmission, non-deliveries, etc., and the private cable companies do the same. There may be a question as to the validity of such clauses of exoneration, and this question is discussed elsewhere. (See *infra*, 2, p. 277.)

English law as to this.

In England the receiver of the telegram has no right of action against the telegraph company. The company was under no contract with him, and a mistake made in transmission is not the wrong known in the English law as "deceit." (*Dixon v. Reuter's Telegraph Company*, 1877, 3 C. P. D. 1, 47 L. J. C. P. 1. See *infra*, p. 323.) In America there are conflicting decisions, but the more general view is that such a right of action exists. The reasons given by different courts are various and

inconsistent. Some courts allow the receiver after he has repaid the sender the cost of sending the message, to sue in his place. A more plausible ground is that a telegraph company holds relations to the public resembling those of common carriers. They are allowed certain privileges, and they assume certain duties. Not all these duties are confined to persons who contract with them; some of them are duties to the public, and among them is the duty of the telegraph company to take reasonable care not to cause damage by mistakes of transmission. (See *Cooley, Torts*, 3rd ed. 2, p. 1382; Beven, *Negligence*, 3rd ed. 2, p. 1122; Pollock, *Torts*, 10th ed. p. 575; Pollock, *Contracts*, 8th ed. p. 224.)

Effects of nullity as regards third parties.

The effect of annulling a contract on the ground of error is, as regards third parties, the same as if it had been annulled for fraud or violence, and has been considered earlier under the head of the action of nullity and its effects. (*Supra*, p. 213.)

Distinction between mistake as to the substance and latent defect.

There is some analogy between the right to annul a contract on the ground of mistake and the right of the purchaser to cancel the sale on the ground of a latent defect in the thing sold. But these two rights of action are by no means identical; they are subject to different rules, and must be carefully distinguished from one another. A latent defect is a defect in the thing which is not apparent, which is unknown to the purchaser, and which diminishes the value upon which the purchaser had to reckon, or renders the thing in question unfit for the use for which it is intended. (C. C. E. 313/387, 320/395; C. C. F. 1641, 1642; C. C. Q. 1522, 1523.) The mere absence of a quality in the thing is not a latent defect, but, as we have seen, if the existence of this quality was a condition, express or tacit, of the sale, the absence of this quality will entitle the purchaser to have the sale annulled on the ground of mistake. (*Aubry et Rau*, 5th ed. 5, p. 106.) Mistake implies the absence of a certain quality in the thing which has been treated as essential. But it does not imply that the thing has any defect which renders it unfit for the use for which it is intended. If a man buys a picture which he believes to be by Rubens, and is sold to him as a work of that master, whereas the picture is by another painter; if he buys an

orchid under the mistaken impression that it is unique; or a horse in the belief that it has a certain pedigree which it has not, we cannot say that in any of these cases the thing has a latent defect. If the purchaser has any remedy it must be the remedy of getting the sale annulled by proof of essential mistake. But if he buys a house and discovers that the roof is supported by a rotten beam; if he buys an engine which has a mechanical defect not apparent except to an expert; if he buys oak planks for a parquet floor and discovers that they contain the germs of destruction owing to insects having got into them in the wood-yard of the vendor, or if he buys wine which has undergone the operation of *plâtrage* he gets the exact thing which he meant to buy, but it has a latent defect which renders it unfit. (See, as to the engine, Req. 31 juill. 1905, D. 1908. 1. 148; as to the oak planks, Req. 26 déc. 1906, D. 1907. 1. 279; as to the *vin plâtré*, Trib. civ. Beziers, 28 juill. 1904, D. 1906. 2. 194. Cf. Req. 26 avril 1906, D. 1907. 1. 509.)

Practical importance of the distinction.

If the case is one of latent defect the redhibitory action on the warranty must be brought in Egypt within eight days of the discovery of the defect, failing which the right of action is forfeited. (C. C. E. 324/402.) In France the action must be brought *dans un bref délai suivant la nature des vices redhibitoires, et l'usage du lieu où la vente a été faite*. (C. C. F. 1648.) There is special legislation in France with regard to *vices rédhibitoires* in the sale of domestic animals. (*Loi du 2 août 1884*.) But when, on the other hand, the action is brought to annul a sale on the ground of essential mistake it can be brought in France within ten years, and in Egypt at any time within fifteen years, there being no special prescriptive period for this case. (C. C. F. 1304; C. C. E. 208/272; C. A. Alex. 19 mars 1913, B. L. J. XXV, 239.) There is a dispute as to whether the prescriptive period runs from the date of the sale or from the date of the discovery of the mistake. (See Aubry et Rau, 5th ed. 5, p. 117; D. N. C. C. art. 1648, nos. 45 *seq.*)

So, where the action was brought to annul a sale of wine on the ground that it was *plâtré*, it was held that this was an action upon a latent defect which could not be brought after the delay allowed by law in this case. (Montpellier, 8 déc. 1904, D. 1906. 2. 194.)

On the other hand, where goods were sold by sample and were

not up to the sample, the Mixed Court of Appeal held that this was a case of essential mistake. They say: *Une pareille action est motivée en effet par l'absence dans la marchandise vendue de certaines qualités substantielles que l'échantillon soumis y aurait laissé croire, absence de qualité constituant l'erreur sur la substance de nature à vicier le consentement.* (C. A. Alex. 13 mai 1914, Gaz. Trib. IV, n. 448.)

And when a machine was sold as of a certain horse-power, and it did not possess this power, the same court held that this was not a latent defect, but an essential mistake, though in the particular case the purchaser was held to have lost his right to challenge the sale by having used the machine for some time without protest. (C. A. Alex. 27 mai 1908, B. L. J. XX, 257.)

The distinction between the sale of a thing which has a latent defect and a sale which is null on the ground of essential mistake is in many cases plain enough. When the sale is null on the ground of mistake the purchaser does not get the kind of thing which he bargained for. He bargained for a picture by Rubens, and a picture by another painter is not the same kind of thing. He bargained for a pedigree animal, and an animal of unknown parentage is a different kind of thing. He bargained for a machine of sixteen horse-power, and a machine of ten horse-power is a different machine. But in all these cases the thing which he gets may be a perfectly good thing of its kind. But when he buys a thing with a latent defect it is not a good thing of its kind. If the picture were painted in colours which faded away in a short time, if the animal had a serious and latent disease, if the machine had a mechanical fault of a serious kind which an ordinary man would not perceive, the purchaser gets the exact thing which he intended to buy, but the thing is imperfect. But there are cases in which the distinction is more delicate. Thus it might be contended that wine, which had been adulterated by the method known as *plâtrage*, was a different kind of thing from wine unadulterated. But, seeing that such adulteration is common and well-known to buyers, the fact that wine has been *plâtré* is not regarded by the French jurisprudence as placing it in a different category. [See on the distinction generally between latent defects and essential mistake in sale, Baudry-Lacantinerie et Saignat, *Vente*, n. 414; *Paup. franç.* vo. *Vices rédhibitoires*, n. 5; D. N. C. C. art. 1641, n. 3.)

CHAPTER X.

MISTAKE IN ENGLISH LAW.

THE English law as to mistake in contracts presents many analogies with the French law, but the two systems differ considerably. In the English law mistake is not a reason for allowing a contract originally valid to be annulled; it renders the contract void *ab initio*. If the mistake is of the character which the law requires, it is shown when the mistake has been proved that there never was the *consensus* of the two minds which is necessary for a contract. (Anson, *Contracts*, 14th ed. p. 175; Pollock, *Contracts*, 8th ed. p. 487.) And the English law, as will be explained later, has a special rule applicable to the cases in which the error of one party has been induced by innocent misrepresentation made by the other party.

The mistake which avoids a contract must be of the kind compendiously described as fundamental error. Such a fundamental error may be (a) as to the nature of the contract; (b) as to the identity of the person with whom the contract is made; (c) as to the identity of the object of the contract; (d) as to the existence of the object at the date of the contract; or (e) as to what the other party is promising. A few well-known cases may be given as illustrations, but it is not possible to treat the subject adequately in a short space. It may be remarked that the cases are not numerous in which the courts are called upon to decide upon the effect of a mistake which has not been induced by fraud or by misrepresentation by the other party.

Party may be bound in spite of his mistake because he is not allowed to prove it.

Before explaining the characteristics of operative mistake in the English law, it is desirable to point out that there are cases in which a party is bound although in fact his consent was given under such a mistake. It may be that his own statements or

conduct have been such that it would be unjust to the other party to allow him to prove his mistake. If this be so, there is in the language of the English law an *estoppel*. The plaintiff is *estopped*, i.e., debarred, from proving that there was no contract.

"It is essential to the creation of a contract that both parties should agree to the same thing in the same sense. . . . But one of the parties to an apparent contract may, by his own fault, be precluded from setting up that he had entered into it in a different sense to that in which it was understood by the other party." (*Per* Hannen, J., in *Smith v. Hughes*, 1871, L. R. 6 Q. B. 597, 40 L. J. Q. B. 221, 228.)

Thus, where the seller sold a hundred chests of tea by sample and by mistake he exhibited a wrong sample it was held that he could not avoid the contract. (*Scott v. Littledale*, 1858, 8 E. & B. 115, 27 L. J. Q. B. 201, 112 R. R. 791.)

The rule of evidence is thus stated in passages which are classical: "Where one by his words or conduct wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time." (*Pickard v. Sears*, 1837, 6 A. & E. 469, 45 R. R. 538, 541.)

And "if, whatever a man's real intention may be, he so conducts himself that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it, and did act upon it as true, the party making the representation would be equally precluded from contesting its truth." (*Freeman v. Cooke*, 1848, 2 Ex. 654, 76 R. R. 711, 719. Cf. *Porter v. Moore*, 1904, 2 Ch. 367, 73 L. J. Ch. 729; *Seton v. Lafone*, 1887, 19 Q. B. D. 68, 56 L. J. Q. B. 415; and cases cited in Leake, *Contracts*, 6th ed. p. 4.) The application of the rule of *estoppel* makes it impossible in almost every case for a plaintiff to avoid a contract on the ground of unilateral mistake. This will appear more clearly in the sequel. We may now describe the kind of mistake which avoids a contract in the English law.

(a) Mistake as to the nature of the contract.

In *Louis v. Clay* the defendant had been induced to affix his signature to a document, the body of which was covered by a piece of blotting paper so that he did not see it. He was told he was signing it as a witness. The paper was in fact a promissory

note upon which his name appeared as joint-maker with another person. It was held that the defendant was not liable on the note to a holder who had given value for it in good faith. The defendant had never intended to sign a note at all. His mind never went with the transaction. (1898, 67 L. J. Q. B. 224; following *Foster v. Mackinnon*, 1869, L. R. 4 C. P. 704, 38 L. J. C. P. 310. See also *Carlisle and Cumberland Banking Co. v. Bragg*, 1911, 1 K. B. 489, 80 L. J. K. B. 472. *Infra*, p. 285.)

(b) Mistake as to the identity of the person with whom the contract is made.

In many cases, such as, for instance, in sales for cash, the identity of the other party is immaterial. But when it is material and there is a mistake of identity, there is no contract.

Defendant had a running account with X, and ordered goods from him at a time when X was his debtor, so that defendant had a set-off or right to plead compensation.

Unknown to defendant, X had sold his business to Y. Y supplied the goods without giving defendant notice that they were not supplied by X. In an action by Y for the price of the goods it was held that X need not pay. There was no contract between him and Y. (*Boulton v. Jones*, 1857, 2 H. & N. 564, 27 L. J. Ex. 117, 115 R. R. 695. Cf. *Lindsay v. Cundy*, 1878, 3 App. Cas. 459, 47 L. J. Q. B. 481; *Baillie's Case*, 1898, 1 Ch. 110, 67 L. J. Ch. 81.)

(c) Mistake as to the identity of the object of the contract.

The English law as to this is the same as the French. *Error in corpore* excludes consent. (B.-L. et Barde, 1, n. 52; *supra*, p. 229.) The following cases are illustrations from the English law of mistake as to identity. Defendant agreed to buy 125 bales of cotton to arrive *Ex* "Peerless" from Bombay. A ship named "Peerless" arrived in December, and the plaintiff tendered the cotton upon it. The defendant refused to accept the goods. In an action of damages for breach of contract defendant pleaded that there were two ships named "Peerless," one of which sailed from Bombay in October and the other in December. Defendant meant to buy the cotton to arrive on the ship which sailed in October. The plea was held good. (*Raffles v. Wichelhaus*, 1864, 2 H. & C. 906, 33 L. J. Ex. 160, 133 R. R. 853.)

Defendant, sued for the price of a lot of ground in Prospect Street in the town of Waltham, pleaded that there were two streets in this town called by that name. He had meant to buy a lot on one of these streets, and the plaintiff had intended to sell a lot on the other. It was held there was no contract. (*Kyle v. Kavanagh*, 103 Mass. 356, cited in Pollock, *Contracts*, 3rd Amer. ed. p. 599.) As to mistake with regard to the existence of a specific thing sold, the *Sale of Goods Act*, 1893, provides, "Where there is a contract for the sale of specific goods, and the goods without the knowledge of the seller have perished at the time when the contract is made, the contract is void." (56 & 57 Vict. c. 71, s. 6.) The principle is a general one and applies to other contracts. When the parties have contracted on an assumption which turns out to have been false that there was an *object* for their contract this mistake is fundamental.

A contract for the sale of a policy of life assurance was entered into by both parties in the belief that the assured was alive. In fact he was dead at the date of the contract. Contract void. (*Scott v. Coulson*, 1903, 2 Ch. 249, 72 L. J. Ch. 223.) But when the thing sold exists, the English law applies with much strictness the rule *caveat emptor*. If there is no fraud or misrepresentation and the buyer is not relying on the skill or judgment of the seller, the buyer of a specific thing has no remedy if the thing is less valuable than he expected. In a strong case A bought from B for 4,200*l.* a ship which was at the time upon a distant voyage. Unknown to both parties the ship was at the date of the sale upon the rocks of a remote island where she was shortly afterwards sold for 10*l.* The sale to A was valid. The thing sold "was still a ship though at the time incapable of being, from the want of local conveniences and facilities, beneficially employed as such." (*Barr and Gibson*, 1838, 3 M. & W. 390, 49 R. R. 650. See *Sale of Goods Act*, 1893, s. 14.)

(d) Mistake as to what other party is promising.

It is not a principle of the English law that a contract can be avoided merely on the ground of material error by one party as to some attribute or quality of the thing, however important this quality may be. To be entitled to a remedy the party must show either (a) that his mistake was induced by the fraud of the other party; or (b) that he was induced to consent by the innocent misrepresentations of the other party, both of which grounds will

be explained later; or (c) that it was a term of the contract express or implied that the object should possess a certain quality which, in fact, it does not possess; or, lastly, (d) that the plaintiff was under a mistake in supposing that the defendant was undertaking to sell him an article possessing a certain quality and that the defendant was aware of the plaintiff's mistake.

The cases under (c) are not really cases of mistake, though, as Sir Win. Anson points out, they are often confused with these. If the plaintiff obtains relief it is not because he was under a mistake as to some attribute of the thing which he got, but simply because he did not get what he bargained for. (See Anson, *Contracts*, 14th ed. p. 159.)

Rule (d) may be made clearer by the following sub-rules:—

(1) Mistake common to both parties.

A mistake common to both parties as to an attribute or quality of the object does not make the contract void or voidable.

A sold to B by sample a quantity of "seed barley." Both parties were mistaken as to the character of the barley, but the bulk corresponded with the sample. It was held that the barley was sold for what it was, and there was no warranty, and the common mistake as to the quality of the barley did not affect the formation of the contract. (*Carter v. Crick*, 1859, 4 H. & N. 412, 28 L. J. Ex. 238, 118 R. R. 521. See Benjamin on *Sale*, 5th ed. p. 102, and p. 617.)

A showed to B, who was a jeweller, a stone, which was in fact an uncut diamond worth 700 dollars. She said she was told it was a topaz. B was not an expert in rough diamonds. He said it was probably a topaz, and that he would give a dollar for it and keep the stone as a specimen. Some time afterwards A sold B the stone for a dollar. It was held that the sale was valid. The stone was sold for what it was. (*Wood v. Boynton*, 1885, 54 American Reports, 610, cited in Benjamin on *Sale*, 5th ed. p. 102.)

(2) Unilateral mistake merely does not invalidate a contract.

The mistake of one party as to some attribute of the thing, when not communicated to the other party, does not render the contract void in the absence of misrepresentation, fraud or warranty. (*Per* Lords Herschell and Watson in *Stewart v.*

Kennedy, No. 2, 1890, 15 A. C. 108; *Wickling v. Sanderson*, 1897, 2 Ch. 534, 66 L. J. Ch. 684; *Scrivener v. Pask*, 1866, L. R. 1 C. P. 715. See Pollock, *Contracts*, 8th ed. p. 515; Leake, *Contracts*, 6th ed. p. 222; Benjamin on *Sale*, 5th ed. p. 90 and p. 100.)

In such circumstances the plaintiff is met by the plea of *estoppel*. (*Supra*, p. 269.)

(3) Passive acquiescence of seller.

The passive acquiescence of the seller in the self-deception of the buyer does not entitle the latter to avoid the contract. The rule is that when the parties are dealing at arm's length each of them must look out for himself. "There is no legal obligation on the vendor to inform the purchaser that he is under a mistake not induced by the act of the vendor" (*per* Blackburn, J., in *Smith v. Hughes*, the case stated in the following paragraph).

Illustrations of rule (d).

If the seller knows that the buyer is consenting only because he misapprehends what is being promised to him he cannot hold the buyer bound. The leading case is *Smith v. Hughes*, 1871, L. R. 6 Q. B. 597, 40 L. J. Q. B. 221. The plaintiff sold oats to the defendant, and delivered new oats. Defendant refused them alleging that he had intended to buy old oats. It was held he must pay for the new oats as he could not prove that the seller knew of his mistaken belief that he was being promised old oats. But if this proof had been made the result would have been different. "If the plaintiff knew that the defendant in dealing with him for oats, did so on the assumption that the plaintiff was contracting to sell him old oats, he was aware that the defendant apprehended the contract in a different sense to that in which he meant it, and he is thereby deprived of the right to insist that the defendant shall be bound by that which was only the apparent and not the real bargain" (*per* Hannen, J., in *Smith v. Hughes*, 1871, L. R. 6 Q. B. 597, 40 L. J. Q. B. 221. Cf. *Scriven v. Hindley*, 1913, 3 K. B. 564, 83 L. J. K. B. 40).

In such a case there is a near approach to fraud.

Another illustration is a case where in an offer made by letter to sell a plot of land the vendor wrote 1,250*l.* as the price in mistake for 2,250*l.* and the purchaser promptly accepted. He

snapped at an offer which he must have perfectly well known to be made by mistake. (*Webster v. Cecil*, 1861, 30 Beav. 62, 132 R. R. 185. See *Tamplin v. James*, 1880, 15 Ch. D. 215; Pollock, *Contracts*, 8th ed. p. 512.)

Equitable power of English courts to rectify instruments.

The English courts possess a useful power which is, however, exercised with much caution, to reform, or "rectify," as it is called, an instrument embodying a written contract when it is clearly proved that the contract found in such an instrument does not correspond with the true intention of the parties.

The power belonged before 1873 only to the courts of equity, but a fusion of the courts of law and equity was brought about by the Judicature Act, 1873, 36 & 37 Viet. c. 66.

The court will not admit parol evidence to alter a written contract if the alleged mistake is denied by one of the parties. (*Mortimer v. Shortall*, 1842, 2 Dru. & War. 363, 59 R. R. 730; *Ex parte Nat. Prov. Bank of England*, 1876, 4 Ch. D. 241, 46 L. J. Bank. 11.) And the court will not rectify a contract when the mistake is not mutual, at any rate unless it was a case when one party accepted an offer which he could not reasonably suppose to express the intention of the offeror. (See as to the last point which is not very certain, *May v. Platt*, 1900, 1 Ch. 616, 69 L. J. Ch. 357; Pollock, *Contracts*, 8th ed. p. 545; 3rd Amer. ed. p. 600 and p. 644; Anson, *Contracts*, 14th ed. p. 174.)

There is a somewhat analogous power under the German Code (art. 155).

Mistake not a ground of damages.

A mistake made in a contract by the offeror or the acceptor is not, in the English law, a civil wrong to the other party though he may have suffered damage by relying upon the declaration of will made to him. And, in the English law, the sender of a message is not liable for a mistake made by the messenger in the transmission. (*Henkel v. Pape*, 1870, L. R. 6 Ex. 7, 40 L. J. Ex. 15. See *infra*, p. 325.)

CHAPTER XI.

MISTAKE IN THE GERMAN LAW.

THE treatment of mistake in the German Code is the outcome of long-protracted discussions and is certainly one of the most original features of that work. It introduces some genuine improvements, but is, perhaps, over subtle.

The articles in their final shape represent a compromise between two extreme views. The advocates of the "real intention," or, as French writers call it, of the *système de l'autonomie de la volonté*, maintained that the business of the law was to give effect to the real mind and will of the party and that he could never be bound by an expression or declaration which did not correspond with his true intention. He might in certain circumstances be liable in damages for wilfully or negligently causing loss to another by incorrect declarations as to his intention, but that was another matter.

On the other hand, the advocates of the "declared intention" contended that a man's declaration of will must be taken to correspond to his true will, at any rate when they had led the other party to enter into, or, *a fortiori*, to execute a contract. The law must have regard to what a man says, it cannot look into his mind.

The great argument for this is the security it gives to honest dealers. Each party is entitled to give credit to the declarations made by the other and to act accordingly. He has not to inquire if the other party *meant* what he said. It is only on this basis that business can be done safely and quickly. (See, for list of authorities on both sides, Windscheid, *Pandekten*, 8th ed. 1, s. 75, p. 322.)

The English law, as above explained, accepts in effect the doctrine of "declared intention" by applying the principle of *estoppel*. (*Supra*, p. 269.)

German writers still dispute if the code accepts in principle the "declared intention," subject to certain qualifications and exceptions, or if it accepts the "real intention," subject to certain

qualifications and exceptions. The sounder view seems to be that it accepts in principle the declared intention. (Cosaack, *Lehrbuch des Deutschen bürgerlichen Rechts*, 6th ed. 1, p. 251; note to art. 118 in French translation of code; Saleilles, *Déclaration de la Volonté*, p. 6, and p. 19, *in fine*.)

The articles in the German Code concerning mistake are as follows:—

119. *Celui qui, en émettant une déclaration de volonté, était dans l'erreur sur son contenu ou qui en réalité n'a pas voulu émettre une déclaration ayant ce contenu, peut attaquer par voie d'annulation sa déclaration, lorsqu'il y a lieu d'admettre qu'il ne l'aurait pas émise s'il avait eu connaissance de l'état des choses et qu'il eût fait une appréciation raisonnable de la situation.*

Est également réputée erreur sur le contenu de la déclaration, l'erreur portant sur les qualités, de la personne ou de la chose qui, dans les rapports d'affaires, sont considérées comme essentielles.

120. *Une déclaration de volonté qui a été transmise inexactement par la personne ou l'établissement employé pour la transmission peut être attaquée par voie d'annulation sous les mêmes conditions préalables que, d'après l'article 119, une déclaration de volonté émise par erreur.*

121. *La mise en œuvre de l'annulation doit nécessairement, dans les cas des articles 119, 120, se produire sans atermoiement imputables à faute (sans retard), à partir du moment où l'ayant droit à l'annulation a acquis connaissance de la cause d'annulation. La mise en œuvre de l'annulation qui se produit à l'égard d'un absent est réputée s'être produite en temps utile lorsque la déclaration d'annulation aura été expédiée sans retard. La mise en œuvre de l'annulation est exclue lorsque, depuis l'émission de la déclaration de volonté, trente années se sont écoulées.*

122. *Si une déclaration de volonté est nulle d'après l'article 118 ou qu'elle soit attaquée par voie d'annulation sur le fondement des articles 119, 120, l'auteur de la déclaration a, lorsque la déclaration devait être émise envers un autre, à indemniser ce dernier, ou, dans le cas contraire, un tiers quelconque, pour le dommage que cet autre, ou que le tiers, éprouve pour avoir cru à la validité de la déclaration, sans cependant que le montant de l'indemnité puisse dépasser la mesure de l'intérêt que l'autre, ou le tiers, avait à l'efficacité de la déclaration.*

Ce devoir de réparation n'existe plus lorsque la victime du dommage se trouvait connaître la cause de nullité ou d'annula-

bilité, ou par suite de négligence ne l'avoir pas connue (la devoir nécessairement connaître).

In subsequent articles it is laid down that the act of avoidance by which the declaration of will may be nullified is a simple declaration made by the victim of the mistake to the other party (art. 143). The questions whether the right to annul existed in the circumstances and, if so, whether it was competently exercised can be brought before the court by the party who has annulled the contract as well as by the adverse parties. (See for discussion of the reasons for and against this change, Saleilles, *Déclaration de la Volonté*, p. 360.)

The striking and novel features in these articles are:—

(1.) They avoid the metaphysical expressions “substance” and “essence” which have been a source of confusion in the French law.

(2.) They make error, in the technical sense, always a cause of nullity and never a reason for declaring a contract null *ab initio*.

The only two cases left in which “mistake,” in a wide sense, renders the contract null are:—

Contracts void *ab initio*.

(a) When there was no agreement as to the identity of the object, and it appears from the declarations of the two parties that these declarations were ambiguous. (Saleilles, *Déclaration de la Volonté*, p. 28; note to French trans. of Code Civ. Allemand, 1, p. 124; Windscheid, *Pandekten*, 8th ed. 1, p. 341; Cosack, *Lehrbuch*, 6th ed. 1, p. 253.)

Here there is simply no contract. The declarations were equivocal and there was only an apparent agreement.

So, when in an order by telegram the thing was ordered under a code-word—*Semilodei*,—and this was understood by the two parties in different senses it was held that there was no contract. (Reichsgericht, 17 Jan. 1908, *Entscheidungen des Reichsgerichts in Zivilsachen*, 68, 6. in Warneyer's *Bürgerliches Gesetzbuch*, 3rd ed. art. 119, note I. 3.)

The English case of *Raffles v. Wichelhaus* above stated is analogous. (*Supra*, p. 271.)

This kind of case is that to which German writers apply the name “concealed misunderstanding”—*versteckter Dissens*.

The distinction between it and “mistake,” in the sense of article 119, is that in the latter there is a “mistake” in the declaration of a party. In this case of “concealed misunderstanding” each of the parties declares his will without any “mistake,” but, owing

to a mutual misunderstanding, they believe they are in agreement, whereas, in reality, this is not so.

This case is specially dealt with in a later article of the German Code:—

Lorsque les parties, dans un contrat qu'elles considèrent comme conclu, en réalité ne sont pas tombées d'accord sur un des points qui devaient être objet de convention, ce qui a été réellement convenu est valable, en tant qu'il y a lieu d'admettre que le contrat, même à défaut de toute disposition prise sur le point dont il s'agit, n'en aurait pas moins été conclu (art. 155).

But, according to the rules of interpretation, the evidence of this misunderstanding must be found in the declarations themselves interpreted in their normal sense.

The English case *Raffles v. Wichelhaus* is an example of declarations equivocal on their face. There might well be, as was the case, two ships of the same name, and there was nothing to show that the two parties both referred to the same ship. (*Supra*, p. 271.)

So with the German *Semilodei* case. The court had to find out what this code-word meant, and it appeared that to a business man it was ambiguous. (*Supra*, p. 278.) Or we might suppose a contract to carry goods to "Berlin," one party meaning the capital of Prussia and the other a small town of the same name in the United States.

But when the declarations of the parties, interpreted by ordinary rules, refer unambiguously to the same object, a contract is formed, although, actually, the two parties had not the same object in mind. The contract here is voidable, not void *ab initio*.

For instance, A who is looking for a flat inspects several which are to let in a building belonging to B. He writes to B offering to take the "first floor" of the building. A means by this the mezzanine floor. B understands him to mean the floor above this, which is often called the *belle étage*. There are no special circumstances in favour of either sense. We must then decide solely by reference to the language of the locality, whether "first floor" means the mezzanine or the *belle étage*. If according to the ordinary language of the place it means the *belle étage*, A has taken that flat, though he did not intend to do so. He can challenge the contract on the ground of mistake, but meanwhile there is a contract.

If by the same test "first floor" means the mezzanine there is likewise a contract and, in this case, it is B who has the right of challenge.

There may even be a contract formed concerning an object *which neither of the parties had in mind*.

In the last illustration if "first floor" in the local use of language meant neither mezzanine nor *belle étage*, but meant the ground floor (*rez de chaussée*), then A has let the ground floor and B has taken it, though this result was not intended by either, and either of them has the right of challenge. And, lastly, if "first floor" is by local usage an ambiguous expression there is, upon the principle above explained, no contract at all from the beginning. See Cosack, *Lehrbuch*, 6th ed. 1, p. 253; Broek, *Das Negative Vertragsinteresse*, p. 113. Cf. Leonhard, R., *Der Irrthum bei nighligen Verträgen*, 2, p. 341.)

The second case in which the contract is void is:—

b) When an offer meant for A goes to B, and is "accepted" by him, there is no contract formed. The offer must be addressed to some particular person, unless, indeed, it is an offer made to the public at large, which is not the case supposed here. And if the offer goes astray and comes into the hands of a person for whom it was never meant there is nothing which this person can accept. No offer was ever made to him. But if A does intend to make an offer to B and carries out his intention, and B accepts the offer, there is a contract formed although A in mistake attributed to B in his own mind the qualities of C. (Saleilles, *Déclaration de Volonté*, p. 26.)

We may compare the English case of *Boulton v. Jones*, which lays down the same rule that an offer can be accepted only by the person or persons to whom it is made. (*Supra*, p. 271.)

Contracts voidable for mistake.

The German Code distinguishes three kinds of mistake which render a contract voidable.

(a) Mistake as to the nature of the transaction.

A signs a guarantee believing it is a petition to a government department. (See Bernhöft, *Das neue bürgerliche Recht*, 1, p. 126.

(b) Mistake in expression of intention.

A desires to buy a machine on trial. He orders it, and by inadvertence omits the words "on trial" or equivalent words. Or he wants to *buy* the shares *x*, and by a mistake of the telegraph clerk his message to the stockbroker instructs the latter to *sell* the shares *x*.

(c) Mistake in the formation of intention.

Here the party says what he meant to say, but he would not have said it but for a mistake as to the facts. When the case falls under (a) or (b) A can annul his declaration if, in the opinion of the court, he would not have made it if he had known the true state of affairs, and had made a reasonable appreciation of the situation.

When the case falls under (c) A can annul his declaration if his mistake was as to a quality of the person or the thing which is considered as essential in ordinary dealings.

In all these cases the German Code sets up a standard partly objective and partly subjective. There are two questions to be answered—(1) would A have consented but for the mistake, and, if this is answered in the negative, (2) would A have been reasonable by an objective standard in considering the mistake essential? The point whether account can be taken of A's special tastes is noticed later. When the case falls under (a) or (b) the answer is, in many cases, fairly easy to give. When it falls under (c) the court may have a difficult question of appreciation.

By taking a partly objective instead of a purely subjective standard the German Code has done something to simplify the matter. It is easier to decide what an ordinary man would have thought than to decide what A thought. Notwithstanding this, the German jurisprudence since the code sufficiently shows the inherent difficulties of the subject. Whether a quality of the person or of the thing is essential becomes in the German system a question of fact. The following illustrations are from German jurisprudence since the code:—

A mistake as to the amount of premium upon an insurance is essential. The director of a sanatorium engages a man as chief medical officer in ignorance of the fact that he has a bad reputation as to morality. Mistake essential. A seller gives credit in the mistaken belief that the buyer is able to pay. The mistake is essential if the buyer's financial standing was such that a merchant of ordinary prudence would not have given him credit. The buyer of premises believes he can get a license to occupy them as a hotel. The license is refused for the reason that the premises do not satisfy police requirements. The buyer's mistake is essential. But his mistake will be unessential if the license is refused, not on account of any unsuitability of the premises, but because the authorities think there are already enough hotels in the locality. Unessential are: A mistake in thinking the other

party owns certain property: a mistake as to the value of the thing; a mistake as to the validity of a hypothec to secure payment; a mistake in supposing that a claim assigned was secured by a hypothec. These are not mistakes as to a *quality* of the person or thing. Examples taken from note to art. 119 in Warneyer's *Bürgerliches Gesetzbuch*, 3rd ed., and from Cosack, *Lehrbuch des Deutschen bürgerlichen Rechts*, 6th ed. 1, p. 242.)

A mistake as to the identity of the object will, as a rule, be essential. Suppose A, who wants to hire the house No. 31, writes No. 30 by mistake. Both houses belong to B, and both are to let. B, the lessor, thinks A meant No. 30 and accepts. There is a contract upon the principle explained above, because the two declarations refer unequivocally to one object, viz., the house No. 30. (*Supra*, p. 279.) The contract may be attacked by A for mistake. But it might be that the two houses are alike in all respects and in equally good condition. Here A's mistake would be unessential. There is no reason for supposing that A would not have taken No. 30. (Bernhöft, *Das neue bürgerliche Recht in gemeinverständlicher Darstellung*, 1, p. 125.)

In deciding whether a mistake was essential can the court take into account the special predilections of the party?

This remains a disputed question. In order to arrive at the conclusion that the mistake was essential the court must, as we have seen, decide (1) that the party would not have made the declaration but for the mistake; and (2) that he would not have made the declaration *if he had made a reasonable appreciation of the situation*. But in answering this second question are A's peculiar views or tastes to be left altogether out of account?

It may be admitted that a purely capricious and altogether irrational view on A's part is to be disregarded. But may not the court consider whether in treating some quality as essential A was acting reasonably in the circumstances, among the circumstances to be considered being his own views and tastes?

German writers disagree on this point.

Bernhöft gives this illustration. A lady wants to order some brown cloth for a dress. By mistake she writes "blue" instead of "brown." She sends the blue cloth back saying that blue is a colour which does not suit her complexion. The dealer offers to prove that this is unreasonable, and that blue suits her very well. Bernhöft thinks that it is reasonable for people to be guided by their individual tastes in such matters; and that the court may take account of this. (*Op. cit.* p. 130.) Cosack is

inclined to keep strictly to an objective standard. He gives a good illustration:

In the same town there are two persons occupied in curing the sick: X, a skilful doctor, and Y, a man who professes to effect cures by prayer. A, who is suddenly taken ill, asks his servant to send for X. The servant by mistaking the number in the telephone book sends for Y. A is unconscious when Y comes. Y prays for him and, afterwards, A recovers. When Y sends in his account A pleads mistake. Y offers to prove that A believed in cure by prayer, and only sent for X because he did not know the address of a prayer-healer. Cosack says this proof is inadmissible. In his view a reasonable man would not have sent for a prayer-healer. (*Lehrbuch des Deutschen bürgerlichen Rechts*, 6th ed. 1, p. 254.)

Mistake of messenger is mistake of party.

Upon this point the German Code settles a long-disputed question. Whether the solution adopted is the best is by no means certain. (*Supra*, p. 259.)

It accepts the theory that the party who transmits a message takes all risks of mistake in the transmission. It is his declaration, and if he chooses to make it in that way he must take the responsibility. If the telegraph company or any other messenger makes a mistake in the transmission the receiver who is in good faith can safely act upon the message. The declaration may be challenged on the ground of mistake, but the receiver will be indemnified. This is a case of responsibility which is purely objective. There may be no fault of the party. Nay it is conceivable that there is no fault on the part of the transmitter. If owing to electrical disturbance due to natural causes a telegraph apparatus is so affected as to transmit a message incorrectly the sender would nonetheless be responsible. (*Saieilles, Déclaration de Volonté*, p. 49.)

But this objective responsibility is only for a messenger whose duty is to carry the message in the form in which it is delivered to him. There is not the same liability for an agent who makes the proposition in the form which he chooses himself. This distinction is, in practice, not always easy to make. (See Cosack, *Lehrbuch des Deutschen bürgerlichen Rechts*, 6th ed. 1, p. 256.)

The Swiss Code uses the wider term *intermédiaire*. (Code Féd. Oblig. art. 27.)

Challenge must be made promptly.

The declaration must be challenged without culpable delay after the victim of the mistake has become aware of it. What amounts to culpable delay is a question of circumstances, and the German courts insist on the prompt exercise of the right of challenge unless there is some valid excuse.

This is one of the points in which the German Code has made a distinct improvement. It is undesirable to leave voidable contracts in suspense for years. Although in the French or English systems the right to challenge may be lost by implied ratification this is a difficult matter to prove, whereas it is easy to prove lapse of time after knowledge of the mistake. The German Code does not fix any definite period within which the challenge must be brought, but it is interesting to note that the Swiss Code implies ratification if no challenge is made within a year after discovery of the mistake. (Code Féd. Oblig. art. 31.)

Damages for mistake.

The author of the declaration must pay the damages caused to the other party by his having relied upon the declaration which is annulled. This liability is objective and exists although the author of the declaration was entirely free from fault, as, for example, in the case already explained, when the mistake was made by the telegraph company or other messenger.

When the mistake was made by the negligence of the author of the declaration the solution of the German Code is clearly right. When the mistake was made without negligence, as for instance, when it was caused by the fraud of a third party, there is room for discussion. But seeing that here a loss has to be borne by one of two persons who are equally free from blame it is not inequitable to lay the burden upon that one whose initiative caused the loss. The author of the mistaken declaration caused the loss. It is fairer that he should pay for it than that the other should suffer for relying upon the declaration. The French law is controversial as to this (*supra*, p. 259).

The English law applies the principle of *estoppel* when there was negligence, but that principle is inapplicable when the plaintiff was free from fault. (*Supra*, p. 269. See Beven, *Negligence*, 3rd ed. 2, pp. 1332 *seq.*)

R presented a paper to the defendant which he signed. The defendant thought it was an insurance paper but it was in fact a

guarantee to pay to a bank sums which might become due to the bank by R. It was held that the defendant was not estopped by his negligence from denying that he had undertaken to guarantee R.'s debt. The defendant did not owe any duty to the bank, and the loss to them was caused by the fraud of R and not by the act of the defendant. (*Carlisle and Cumberland Banking Co. v. Bragg*, 1911, 1 K. B. 489, 80 L. J. K. B. 472.)

The correctness of the decision has been called in question. (Anson, *Contracts*, 14th ed. p. 164; Law Quarterly Review, 28, p. 190.)

In any event, the German law would have made the defendant pay the bank all that they had lost by relying on the declaration made by R. Bernhöft gives as an illustration a case where the facts were substantially the same as in this one and points out that the only practical consequence of the challenge on the ground of mistake would be to prevent the bank from continuing to give advances on the security of the guarantee. As to past advances the guarantor must pay them. (*Das neue bürgerliche Recht in gemeinverständlicher Darstellung*, 1, p. 126.)

This is a more equitable result than that reached in the English case. When the mistake which caused the loss was purely a mistake on the part of the messenger the German rule that the sender is nevertheless liable is open to serious criticism.

The question has been discussed elsewhere in explaining the French law. (*Supra*, p. 259.)

Damages not due if victim knew or ought to have known of the mistake.

The indemnity is not payable if the other party knew *or ought to have known* of the mistake. This is one of the numerous cases in which the German Code lays down an objective standard. A man is not allowed to plead his ignorance unless this ignorance is excusable. He cannot plead ignorance if a man of reasonable care and common-sense would, in the circumstances, not have been ignorant. There is a duty on the part of each party to the contract not to cause damage to the other by his negligence and the ignorance here is in itself negligence. The principle is familiar in the English law also and the rule is well stated by Mr. Terry: "If a person is already under a duty to conduct himself reasonably with respect to a certain possible consequence of his conduct, an act or omission by which he precludes himself from gaining knowledge about the matter may itself be unreason-

able and be directly a breach of the duty." (*Leading Principles of Anglo-American Law*, p. 182.) And in the English law culpable ignorance may constitute the negligence which bars the party from setting-up his mistake. (*Howatson v. Webb*, 1908, 1 Ch. 1, 77 L. J. Ch. 32.)

The following are illustrations from German sources:—

F sells to G an immoveable X by a verbal agreement which is null for want of form. Thereafter F goes to a notary and causes him to prepare a deed of sale but by mistake he indicates the immoveable Y as the object of the sale instead of the immoveable X. G appears before the notary and signs the deed without noticing the mistake. F challenges the sale. G can claim no indemnity because with ordinary care he would have discovered the mistake. (Cosack, *Lehrbuch des Deutschen bürgerlichen Rechts*, 6th ed. 1. p. 244.)

A orders from B, a foreign dealer in wild animals, "1 or 2 monkeys." By a mistake of the telegraph clerk the message arrives "102 monkeys." B collects these and sends them. A challenges. Can B claim compensation? Not if he knew A was a private individual unlikely to need monkeys upon such a scale. (Bernhöft, *op. cit.* 1, p. 129.)

A with his wife and two children sit down at an hotel to a *table d'hôte* dinner at a fixed price. A notices that other guests have a course of oysters which is not served to him. A says to the waiter, "Why do you not give us oysters?" The waiter brings them. When A gets the bill there is an extra charge of P.T. 30 for the oysters. It appears that the other guests had arranged to pay extra. A refuses to pay for the oysters on the ground of mistake. Considering his circumstances A would not have ordered oysters if he had known he would have to pay P.T. 30 for them. The challenge is therefore good. Can the hotel-keeper claim the loss, *i.e.* the cost price of the oysters? Probably not, because the waiter was careless in not drawing A's attention to the fact that an extra charge was made for the oysters. (Bernhöft, *Das neue bürgerliche Recht in gemeinverständlichen Darstellung*, 1, p. 127.)

Indemnity calculated by theory of "negative interest."

The indemnity is to be calculated according to a special principle. What is to be paid is the *intérêt négatif*. This requires explanation.

The principle is that the party is to be indemnified for the

loss which he has sustained by his misplaced confidence in the validity of the contract. He was entitled to rely upon the declaration made to him. He is therefore to be put back in the same position as if he had not made the contract. He cannot claim the damages to which he would have been entitled if there had been a valid contract and the other party had broken it, because the contract here being avoided he is himself relieved of the duty of making the prestation which he promised. Speaking generally, the "negative interest" will include the expenses which the party has incurred in carrying out the contract on his part, the loss which he has sustained by losing other opportunities, and so on. But the German Code adds as a restriction that the "negative interest" is never to exceed the damages which would have been due for inexecution if the contract had been a valid one (art. 122 and art. 307).

Cosack gives these illustrations:—

(a) A makes a gift to B of a large house and garden worth L.E. 30,000. B pulls down the house and erects a small luxurious villa which costs L.E. 16,000, without thereby increasing the total value of the immoveable. A then challenges the gift and succeeds. He must pay B not L.E. 30,000, the damages for inexecution, but L.E. 16,000, which B has spent in reliance on the validity of the gift.

(b) The same facts, except that B has spent L.E. 40,000 on the villa. He can claim only L.E. 30,000 because the "negative interest" is never to exceed the "positive interest." (*Lehrbuch des Deutschen bürgerlichen Rechts*, 6th ed. 1, p. 244.)

This measure of damages is undeniably a sound one and it is perfectly competent for the French or Egyptian courts to apply it when under their law damages are payable in respect of void or voidable contracts. (See on "negative interest" generally, Ihering, *Culpa in Contrahendo* in *Gesammelte Aufsätze*, 1, p. 327, and in French translation, *Œuvres choisies*, 2, p. 1; Broek, W., *Das Negative Vertragsinteresse*; Windseheid, *Pandekten*, 8th ed. 2, s. 307, note 5; Cosack, *ut sup.*; Warneyer, *Bürgerliches Gesetzbuch*, 3rd ed. note on art. 122; Saleilles, *Théorie Générale de l'Obligation*, 3rd ed. p. 164, and *Déclaration de Volonté*, p. 44.)

It does not seem that the Roman law made the distinction between the negative and the positive interest. (Girard, *Manuel*, 5th ed. p. 445.)

CHAPTER XII.

DURESS OR VIOLENCE.

THE second of the vices of consent is violence, or as the Egyptian Code calls it, duress, employing here the technical term of the English law.

Violence as affecting legal rights in general.

There are many ways in which the force of circumstances may influence the will of persons in such a way as to affect legal rights. And this external pressure may take many forms. It may be, for example, some natural catastrophe, such as flood, fire, storm, or pestilence; it may be violence on the part of an armed enemy, or a mob; it may be the threats of an individual. This external force, whatever it is, may affect legal rights either by preventing their creation or by preventing or modifying their exercise. And it may be laid down as a general rule that unless there is fault on the part of the person who suffers from this external force, or unless by law or by agreement the risk of loss so caused lies upon him, the law will endeavour to protect him from injury. It is not always possible to do so but the law will help him if it can.

The principle is stated in an admirable study of this subject by M. Demogue in these terms:—

Un fait brutal quelconque, fait de l'homme ou de la nature, ayant déterminé à un acte juridique quelconque ou empêché un acte ou fait juridique quelconque, le droit s'efforce d'annihiler les conséquences de cet événement. (Rev. Trim. 1914, p. 442.)

For example, if by law or by contract an act has to be done within a certain time, and the person whose duty it is to perform this act is prevented by this external force from acting within the time fixed, his delay will be excused unless there is some rule to the contrary in the special case. (See Rouen, 12 mars 1873,

D. 74. 2. 60, delay to pay insurance premium excused by siege of Paris; Nancy, 10 nov. 1909, S. 1910. 2. 103, notice of appeal prevented by strike in post office; C. A. Alex. 13 déc. 1900, B. L. J. XIII, 53, action not brought within prescriptive period because plaintiff imprisoned by enemy.)

And, as will be explained in dealing with the extinction of obligations, when a debtor is prevented by this external force, to which the terms *force majeure* and *cas fortuit* are there applied, from executing what he has promised, he will be excused. And the same principle should apply to cases where the external force has prevented the acquiring of a right. But here there are so many elements of uncertainty that the courts cannot always find a remedy. How can we say for certain if the right would have been acquired if the violence had not existed? The plaintiff who says he was on the point of acquiring it might have changed his mind or some other circumstance might have happened which would have prevented the acquisition.

But illustrations of the application of the rule are not wanting in practice. Thus, it is an actionable wrong on the part of C to prevent by the exercise of violence A from contracting with B. A syndicate, for example, may boycott an employer of labour—*la mise à l'index*—but they must not by violence prevent people from entering his works or publish his name in a black list in order to excite animosity against him. (See D. 1903. 2: 329, *Dissertation* de M. Planiol; S. 1912. 2. 97, *Dissertation* de M. Naquet.)

And there is much French authority for the proposition that he who has prevented another from making a will is liable in damages to the third party to whom the deceased had declared his intention of leaving his property. (B.-L. et Colin, *Donations et Testaments*, 2, n. 1865; Aubry et Rau, 5th ed. 10, p. 453. *Contra*, Montpellier, 22 mai 1850, D. 54. 5. 743; D. N. C. C. art. 969, n. 166.)

It might well seem that the difficulty of estimating the damages in such a case as this is insuperable. When the deceased said he was going to leave his property to the plaintiff he may not have meant what he said, and, at any rate, he was entitled to change his mind. In an interesting American case the Supreme Court of New York held that no action lay. The allegation was that the defendants by fraudulent conspiracy induced the testator to revoke a will he had made in favour of the plaintiff. It was

held that no ground of action was stated. "At best the contemplated gift was not to be realised till after the death of the testator, which might not happen until after the death of the plaintiff: or the testator might change his mind or lose his property." (*Hutchins v. Hutchins*, 1845, 7 Hill, 104; *Wigmore, Cases on Torts*, 1, p. 265.)

It is not, however, with the violence which prevents the formation of a contract or the performance of a juridical act that we are here concerned, but only with violence as a vice of consent.

Violence or duress as vice of consent.

Upon the subject of duress as a cause of nullity of contracts the Egyptian codes contain only a single article:—

Duress, to be a cause of nullity, must be sufficiently serious to influence a reasonable person, having regard to the age, sex, and position of the contracting party. (C. C. E. 135/195.)

Notwithstanding this brevity, there is no room for doubt that the Egyptian legislator intends to preserve the law stated in the French Code. But the omission of the requirement which the French Code makes that the fear must be of a *mal considérable et présent* is intentional and designed to remove difficulties which have been felt in France upon the construction of these words, (C. C. F. 1111—1115. Cf. C. C. Q. 994—999.)

Consent has been given.

The codes are here dealing with the kind of violence which induces a man to give his consent because he is afraid to refuse to do so. He is frightened into giving his consent, but he nevertheless gives it. *Coacta voluntas tamen voluntas est.* (See Dig. 4. 2. 21. 5; Girard, *Manuel de Droit romain*, 5th ed. p. 462; D. N. C. C. art. 1112, n. 4; Demogue, R., *De la Violence comme Vice du Consentement*, in Rev. Trini. 1914, p. 435.) If a man holds a pistol to my head and threatens to blow my brains out unless I sign a deed in his favour, and I sign the deed, this is because I choose the lesser of two evils. But I do exercise a choice. I give my consent though it is not freely given. It is given although it has been *extorqué*, to use the word of the French Code. (C. C. F. 1109.) We must distinguish from this the case where there is a complete absence of my will, what the old writers called *vis absoluta*. If a man were to take hold of my

hand and with it were to sign my name to a cheque the signature would not be mine at all. And if it is true in fact that a person under hypnotic suggestion is so completely under the control as to have no free will, his apparent consent given under the hypnotic trance would not be a consent at all. (Beudant, *Contrats*, p. 120; Laurent, 15, n. 511. Cf. Pollock, *Contracts*, 8th ed. p. 636; Cosack, *Lehrbuch des Deutschen bürgerlichen Rechts*, 6th ed. p. 164.) This distinction exists in the nature of things, and it is preserved in the more recent codes. (See German Code, arts. 105, 123; Saleilles, *Déclaration de Volonté*, p. 56; Code Suisse des Obligations, art. 29.) The violence then with which the codes are concerned is a kind of violence which does not prevent the formation of the contract, but merely makes it voidable at the instance of the person whose will was coerced. Like mistake and fraud, it is a vice of consent.

Violence not an exact term for this vice of consent.

When we say that a contract may be annulled upon proof of duress or violence, this is a somewhat abridged statement of the matter. What we mean is that in the case under consideration the party who consented was in great fear, and that this fear induced his consent. Instead of saying his consent was vitiated by violence it would be more precise to say that it was vitiated by the fear created by the violence. The Roman lawyers either used the two words together—*vis metusve*, or, more generally, *metus* only. (See Dig. 4. 2. 1; Girard, *Manuel*, 5th ed. p. 417; Maynz, *Cours de Droit Romain*, 5th ed. 2, p. 168.) And the Swiss Code of Obligations does not use the word violence at all, but says:—

Si l'une des parties a contracté sous l'empire d'une crainte fondée que lui aurait inspirée sans droit l'autre partie ou un tiers elle n'est point obligée. (Code Suisse Oblig. art. 29.)

There is another advantage in stating the law in this way, namely, that it suggests more definitely the relative character of the violence. The question the court has to decide is not so much whether the violence was great or small as whether it was sufficient in the circumstances to create the fear. (See Rossel et Mentha, *Manuel de Droit Civil Suisse*, 3, p. 58.)

What amounts to duress or violence as a vice of consent?

The French Code says: *Il y a violence, lorsqu'elle est de nature à faire impression sur une personne raisonnable, et qu'elle peut lui inspirer la crainte d'exposer sa personne ou sa fortune à un mal considérable et présent.*

On a égard, en cette matière, à l'âge, au sexe et à la condition des personnes (art. 1112). There is here a certain confusion between an absolute and a relative standard. In the Roman law Gaius said that the fear under which the party gave his consent must be *metus non vani hominis sed qui merito et in homini constantissimo cadat*. It must be a fear which would terrify a stout heart. (Dig. 4. 2. 6.) This is quite intelligible, though we may think the rule too strict. But when the French Code qualifies it by saying that in judging of violence we must have regard to the age, sex and position of the parties, there is not much left of the rule that it must be sufficiently serious to influence a reasonable person. A man of ordinary firmness of character and experience of affairs will not be heard to say that he was terrified by threats which his common sense might have told him were absurd, but an inexperienced countryman or a person of naturally weak and timid character, or one enfeebled by age or disease will much more easily show that his consent was extorted from him by fear. (Baudry-Lacant. et Barde, *Oblig.* 1, n. 74; Aubry et Rau, 5th ed. 4, p. 501, note 16; D. N. C. C. art. 1112, n. 61.)

Violence may be physical or moral.

We may take as a typical case of physical violence the case when a pistol is held to a man's head to make him consent, or when he is beaten until he gives way. (See, *e.g.*, Agen, 14 juin 1890, D. 91. 2. 153; Req. 19 juin 1877, D. 78. 1. 160; Dijon, 17 mai 1872, S. 73. 2. 10.) But more frequently the violence is moral, as it is called, that is, it consists in threats of evil to follow if the person threatened does not consent. Nor is it necessary that the threats should be of physical suffering; they may be threats of injury to the fortune or honour of the victim. Moreover, a man may be frightened into giving his consent by a danger which threatens his wife or child, or his father or mother, just as much as by a danger which threatens himself. Nay, more, there may be cases in which the danger threatened to a friend may exercise such an influence on the mind of the party who

contracted as to vitiate his consent. As regards the case of the friend the French Code makes it doubtful, because it says: *La violence est une cause de nullité du contrat, non seulement lorsqu'elle a été exercée sur la partie contractante, mais encore lorsqu'elle l'a été sur son époux ou sur son épouse, sur ses descendants ou ses ascendants* (art. 1113).

According to some French authorities this list must be considered as limitative. (Aubry et Rau, 5th ed. 4, p. 499, note 14.) And according to other authorities the distinction to be made is that violence exerted against the persons enumerated in the article produces *de plein droit* the same effect as if it had been directed against the contracting party, whereas if the violence has been directed against any person other than one of those enumerated the court is free to determine the question according to the special circumstances. (B.-L. et Barde, *Oblig.* 1, n. 89; D. N. C. C. art. 1113, n. 7; Rev. Trim. 1914, p. 469.) In a recent case the Court of Paris held that violence directed against a friend could not be regarded as vitiating consent. (Paris, 31 mars 1906, D. 1907. 2. 366.) We are relieved from these difficulties of interpretation, because the Egyptian Code does not contain a similar article. It cannot be doubted that a danger threatened to an intimate friend might "influence a reasonable person," and if the fear of such a danger had in fact induced the party to consent the Egyptian courts would be entitled to annul the contract. The Quebec Code, with good reason, says that fear may be a cause of nullity "sometimes when it is a fear of injury to strangers." (C. C. Q. 996.)

Illustrations of moral violence.

The question what amounts to the degree of violence sufficient to vitiate the consent is emphatically a question of fact, and depends upon the circumstances of each particular case. (D. N. C. C. art. 1112, n. 80.) In the following cases the French courts found sufficient proof of moral violence. The manager of a company threatens some of his subordinates with dismissal if they do not sign bills of exchange. (Bastia, 6 août 1892, D. 93. 2. 359.)

A father who has taken his children abroad after his divorce refuses to bring them back to France, unless his wife, to whom the custody of the children has been given by the court, agrees to give up the custody. (Trib. Seine, 28 mai 1892; Rev. Trim. 1914, p. 451.) A priest abuses the fears of a sick person in

order to induce him to leave a legacy to a third party. The judgment said: *l'influence du confesseur sur l'esprit de son pénitent, au moment des angoisses d'une maladie mortelle, est la violence morale la plus considérable qui puisse peser sur la volonté de l'homme.* (Trib. de Pont-l'Evêque, 22 janv. 1861, sous Civ. 23 juin 1863, D. 63. 1. 310.)

A husband threatens his wife with prosecution for adultery in order to extort from her a receipt for monies which she has not received. (Req. 6 avril 1903, D. 1903. 1. 301.)

An insurance company threatens to prosecute the father of the assured for setting fire to the building which was insured unless the son renounces his claim to any indemnity. (Rouen, 15 juill. 1881, S. 81. 2. 243, Journal du Palais, 81, p. 1136.)

A doctor abuses his position in order to extort an exorbitant price for an operation which requires a certain serum of which he has the monopoly. (Trib. Seine, 23 févr. 1907; Rev. Trim. 1914, p. 457; Rev. Crit. 1907, p. 193. In this case the facts alleged were not proved.)

A mother shuts her daughter up in a room and threatens to leave her alone during her confinement. (D. N. C. C. art. 1114, n. 3.)

The members of an orchestra of a theatre threaten the manager with an immediate strike at the moment that the performance is about to begin. (Rev. Trim. 1914, p. 461.)

A person threatens to reveal to the *fiancée* of the plaintiff facts injurious to his reputation. (Paris, 28 févr. 1912; Rev. Trim. 1914, p. 451. Cf. Limoges, 23 avril 1901, D. 1902. 2. 474; Bordeaux, 14 août 1876, sous Req. 15 juill. 1878, S. 79. 1. 393, Journal du Palais, 79, p. 1041, and note by M. Labbé, D. 79. 1. 22; Rev. Trim. 1912, p. 975.)

Officers of an invading army in occupation of the territory threaten the *maire* of a *commune* with penalties if he does not agree to take charge of a property belonging to the enemy. (Besançon, 8 mai 1875, D. 76. 2. 60.)

An agreement made by the spouses at the time of a divorce with regard to the custody of the children, the amount of an alimentary allowance, and so forth, may be annulled on proof of violence. (Req. 4 août 1913, S. 1914. 1. 327; Rev. Trim. 1915, p. 175.) In an Egyptian case it was held that a weak young man had been induced to sign bills by moral violence. (C. A. Alex. 12 déc. 1918, B. L. J. XXXI, 66.)

Tendency of French jurisprudence to extend the meaning of moral violence.

There is a marked tendency in the French jurisprudence to give a wide interpretation to moral violence.

The following cases are strong examples:—

The owner of a wash-house—*lavoir*—could not obtain a water supply except on condition of paying the arrears due by his predecessor. It was held he could recover the sums paid under the influence of this moral violence. (Trib. Seine, 16 mai 1910; Rev. Trim. 1914, p. 457.)

A bailiff promised a banker to act for him at rates below the legal tariff, because he could not refuse to do so without losing an important *clientèle* which he had taken into consideration in acquiring his office. (Toulouse, 26 juin 1911, D. 1913. 2. 187.)

A person who had a contract for the supply of electricity found means to get the electricity used for lighting purposes at the same price as that fixed for electric power. The company which supplied the electricity suspected the fraud, but notwithstanding gave him receipts without protest from the fear that they could not prove his misconduct, and dreading lest the *abonné*, who was the proprietor of a newspaper, should attack them in the press. The *Cour de Cassation* found moral violence in this case, though there was no positive act on the part of the debtor to induce the company to give him the receipts. (Crim. 27 juill. 1912, S. 1913. 1. 338. See Rev. Trim. 1913, p. 808.) And it has been suggested with good reason that there might be moral violence in a threat made by a person to injure himself, as, for example, if a son induced his father to consent to a contract by threatening that he would kill himself or take up some dangerous pursuit such as aviation. (See Demolombe, 24, n. 163; Rev. Trim. 1914, p. 470.)

There is an American case in the contrary sense. "The threat made by a husband, through the procurement of one of the payees of a note executed by him, that unless his wife would sign it, he would poison himself, does not amount to duress since the maker and object of the threats were the same." (*Wright v. Remington*, cited in Pollock on *Contracts*, 3rd Amer. ed. p. 729.) But duress at common law is a much narrower term than violence in the civil law. (See Pollock, *Contracts*, 8th ed. 636.)

Moral violence may consist in an abstention.

It is sufficiently clear that the threat to leave a person without help who is exposed to some serious danger may induce him to give a consent which is vitiated by fear.

So it was held there was violence in the act of a servant who intentionally left her old and infirm master in want of the necessities of life in order to frighten him into leaving her a legacy. (Cass. 19 juin 1877, S. 78. 1. 271, D. 78. 1. 160, Journal du Palais, 78. p. 676.) And the cases cited above, of the mother who threatened to leave her daughter alone during her confinement, and of the father who refused to bring his children back from a foreign country unless the mother would give up her right to their custody, are illustrations of this rule.

Threats must be unjustified.

As a general rule it is not violence to threaten to do anything which one has a legal right to do; the violence threatened must be illegal. A man is entitled to threaten his debtor that he will take legal proceedings to make him pay his debts or he may threaten a person who has stolen his property with criminal proceedings. *La violence morale ne saurait résulter de la résistance à une demande en paiement, alors même que l'état de gêne du créancier lui rendrait cette résistance plus pénible, étant toujours loisible au créancier de recourir à la justice.* (C. A. Alex. 13 mai 1914, B. L. J. XXVI, 388.) Nor is there anything unlawful if by threatening to sue a husband for a debt which he owes the creditor induces the debtor's wife or his friend to become surety for him. (B.-L. et Barde, *Oblig.* 1, n. 80; Aubry et Rau, 5th ed. 4, p. 499; D. N. C. C. art. 1112, n. 19; Paris, 5 août 1853, D. 55. 2. 17; Rev. Trim. 1914, p. 462.) And if a father, in order to save his son from disgrace, guarantees the payment of moneys which the son owes, the fact that the father's paternal feelings led him to make the contract does not in itself indicate either fraud or violence. (C. A. Alex. 3 juin 1911, B. L. J. XXIII, 351. Cf. C. A. Alex. 16 déc. 1896, B. L. J. IX, 58.)

Nor, perhaps, is it unlawful for the creditor in a natural obligation to press the debtor to transform it into a civil obligation if this latter contract is itself reasonable. If, for example, a man has abandoned a mistress with whom he has lived for several years, is it unlawful for her to threaten to disclose their relations

unless he makes her a reasonable compensation for the wrong which he has done her? (See Paris, 18 févr. 1910, S. 1910. 2. 220; Demogue, *Notions Fondamentales du Droit Privé*, pp. 658 seq.; Rev. Trim. 1914, p. 463.) But even when the threat is to enforce a lawful right in a lawful way it must not be turned into an instrument of extortion. If by the exercise of the threat the person threatened is induced to pay much more than he owes, or if advantage is taken of the terror of a guilty person to extort from him an extravagant sum as the price of secrecy there is violence in the legal sense. (B.-L. et Barde, *Oblig.* 1, n. 81; Aubry et Rau, l.c.; Cass. 19 févr. 1879, D. 79. 1. 445; D. N. C. C. art. 1112, n. 25.) We may say here that there is an abuse of the right. The machinery of the law is placed at our disposal in order that we may obtain payment of our debts and protection against injuries and not in order that we may use it as an engine of extortion. Nothing could be more against public policy than to allow people to make money by blackmailing.

The Quebec Code introduces an article to express this rule. "If the violence be only a legal constraint, or the fear only of a party doing that which he has a right to do, it is not a ground of nullity; but it is, if the forms of law be used or threatened for an unjust or illegal cause to extort a consent." (C. C. Q. 998.)

The principle is thus laid down by the *Cour de Cassation*:—

Les voies de droit employées par l'une des parties contre l'autre ne constituent pas par elles-mêmes la violence dans le sens de la loi et ne peuvent en principe motiver l'annulation de la convention qui en a été la suite. Mais cette règle n'a pas un caractère absolu. Il y a lieu d'examiner si en fait le créancier n'a fait qu'user régulièrement de son droit ou s'il en a abusé. Suivant les cas, les juges peuvent voir dans les procédés employés pour extorquer au débiteur des promesses excessives une violence illégitime de nature à vicier le consentement. (Req. 10 nov. 1908, S. 1909. 1. 76, D. 1909. 1. 16. Cf. Req. 19 févr. 1879, D. 79. 1. 445. Saleilles, *Déclaration de Volonté*, p. 58.)

To threaten a debtor with bankruptcy is frequently a perfectly legitimate act, but if it is used to extort more than is due there is violence. (B.-L. et Barde, *Oblig.* 1, n. 76; Bufnoir, *Propriété et Contrat*, p. 607; Demolombe, 24, n. 140; Douai, 5 juill. 1894, sous Cass. Civ. 26 juill. 1897, D. 1901. 1. 28; C. A. Alex. 16 déc. 1896, B. L. J. IX, 58.)

A person caught *en flagrant délit* may be liable to special penalties, but the situation must not be abused, as, for instance,

if a husband who finds a man in his wife's company in very suspicious circumstances gets him to sign a bill of exchange. (Caen, 9 avril 1853, S. 1854. 2. 30, D. 54. 2. 189.)

If by putting an embargo on the cargo of a ship the captain is coerced into giving his consent to pay unjustifiable claims this is violence. (Req. 19 févr. 1879, D. 79. 1. 445.) In all these cases the question to be examined is not whether a serious danger was threatened or whether this was likely to impress the mind of the debtor, the point is, was the person making the threat seeking to enforce a just and lawful claim? This is a question of fact in each case. (Req. 6 avril 1903, D. 1903. 1. 301; Cass. 31 déc. 1913; Rev. Trim. 1914, p. 453.) In many cases the courts have found that there has been an abuse of the right to threaten legal proceedings. (See Cass. 31 déc. 1913, D. 1917. 1. 143; Cass. 9 avril 1912, D. 1917. 1. 103; Paris, 26 mars 1909, in note to last case.)

Can the court while annulling the contract allow the defendant to retain what was due to him?

This is a point of considerable difficulty. If a creditor to whom 5*l.* is due succeeds in extorting 50*l.* from his debtor and the debtor gets the contract annulled, must the creditor return the whole sum or will the court allow him to retain the 5*l.* to which he was justly entitled? In several French cases the courts have annulled the contract so far as it was exorbitant while allowing it to produce its effect as to the rest. (Cass. 10 nov. 1908, D. 1909, 1. 16; Trib. Seine, 16 févr. 1906; Rev. Trim. 1914, p. 456.) The courts have sometimes justified this equitable solution by saying that when repetition of money paid under an unlawful contract has been ordered, this is because it was received without a cause, and repetition accordingly should not be ordered of sums which were justly due. From this point of view the cases may be compared with those in which the courts have reduced to a moderate amount excessive sums promised by a man to his mistress when the cohabitation has terminated. (C. A. 13 juin 1909, O. B. XI, n. 3.) A similar question arises when the violence does not consist in threats made by the defendant but in some danger which he did not create, and it will be referred to later.

Violence may be that of a third party.

It will be explained in speaking of fraud that the fraud of a third party is not a ground for annulling a contract in a question with a party who was unaware of the fraud and was not represented by the wrongdoer. (*Infra*, p. 316.) The rule is different as regards violence. A contract into which a man has been coerced by violence is voidable even if the violence was that of a third party and the party to the contract was unaware of it. The French Code expressly says so. *La violence exercée contre celui qui a contracté l'obligation, est une cause de nullité, encore qu'elle ait été exercée par un tiers autre que celui au profit duquel la convention a été faite.* (C. C. F. 1111.)

The distinction as to this point between fraud and violence is an inheritance from the Roman law. (Dig. 44. 4. 4. 33; Girard, *Manuel*, 5th ed. p. 462; Pothier, *Oblig.* n. 23.)

The Egyptian Code is silent, but as it does not say anything to the contrary, it is to be presumed that by "violence" it denotes "violence" as understood in the French law, and that is not necessarily the violence of one of the parties to the contract. (C. C. E. 135/195; C. A. Alex. 11 avril 1888, R. O. XIII. 171; Halton, I, p. 318.) Although the distinction is traditional it does not rest upon very strong grounds.

Why should the innocent party be exposed to see his contract annulled and to the damage which may be caused to him thereby? The Swiss Code of Obligations remedies this hardship: *Lorsque les menaces sont le fait d'un tiers et que l'autre partie ne les a ni connues, ni dû connaître, celui des contractants qui en est victime et qui veut se départir du contrat est tenu d'indemniser l'autre si l'équité l'exige* (art. 29).

But no such remedy is open under the French law. The justifications of annulling a contract in which one of the parties was coerced to give his consent by the threats of a third party are such as these:—

(1) It is more difficult to protect oneself against violence than it is against fraud, and the person threatened may have to make up his mind at once. If a man by holding a pistol to my head induces me to sign a contract in favour of Hassan I have to act at once, and my will is not free. Whereas, if a man tries to persuade me by reasoning with me to make a contract with Hassan, I have time to reflect and my suspicions are aroused by his pressing me to make a contract in which he has no apparent interest.

(2) It has also been suggested that in a disturbed state of society one person, such as the leader of a band of brigands, might by threats induce a promise for the benefit of the whole group, in which case it would be very hard to throw on the promisor the burden of proving that all of them knew of the violence. These reasons, it must be admitted, are not particularly convincing.

The distinction is an old one and it has been retained, probably, more out of legal conservatism than for any other reason. (See Bufnoir, *Propriété et Contrat*, p. 616; Saleilles, *Déclaration de Volonté*, p. 61; B.-L. et Barde, 1, n. 94; Aubry et Rau, 5th ed. 4, p. 507, note 29.)

It is noteworthy that the modern codes retain the distinction, though the Swiss Code as we have seen makes certain reserves which modify the rigour of the rule. (Code Féd. Oblig. art. 29; German Code, art. 123; Code Maroc. Oblig. art. 49.)

Is it violence to take advantage of a danger which one has not created?

In the cases considered there has always been violence exercised on the mind of a person in order to extort his consent to the determinate act which it is sought to annul. But the case frequently presents itself where the person who is in a position of danger voluntarily promises a sum to an innocent third party who will relieve him from the danger. A man who has been carried off by brigands promises to pay a large sum as ransom to a person altogether unconnected with the brigands if he will help him to escape. Is the contract binding? It would not have been made but for the danger, but the deliverer was not responsible for the danger. The French doctrine is much divided upon this question. (B.-L. et Barde, *Oblig.* 1, n. 77; Aubry et Rau, 5th ed. 4, p. 501; Saleilles, *Déclaration de Volonté*, p. 59; D. N. C. C. art. 1112, n. 47.)

The Quebec Code expressly declares that a promise of this kind is not invalid. (C. C. Q. 999.) But there is no such provision in the French Code or the Egyptian Code, and the question must therefore be decided upon principle. It is contended by some French writers that in the case supposed the violence is not the direct cause of the contract, but is merely the occasion of it. When the French Code speaks of the consent being *extorqué par violence* this refers to the act of man, and means that the violence must have been consciously exercised to compel consent to the

particular act. Here we are in an altogether different situation, and the contract is unchallengeable. (C. C. F. 1109; Huc, 7, n. 30.) Some modern writers adopt the very equitable solution of Pothier, that although the promise cannot be annulled on the ground of violence, yet, if an excessive sum has been promised, the court has power to reduce it. They contend that the language of the code does not exclude this view. (Pothier, *Oblig.* n. 24; Planiol, 2, n. 1076; D. N. C. C. art. 1112, n. 51.) Or perhaps a more correct way of stating the matter would be to say that, although the contract may be annulled on the ground of violence, the court in annulling it has at the same time power to award a reasonable compensation for the service rendered by the person who has saved the other from the danger. The principle is that to take advantage of a man's danger in order to wring from him an extortionate reward is to exercise a kind of violence, and it would apply to cases where the danger threatened another. If a man's wife is drowning and a boatman refuses to go to her relief unless the husband promises 1,000*l.*, can the consent be considered as freely given? Unless the language of the code is clearly limited to the cases by which a man profits by threats which he has made there is every equitable reason for giving a wide meaning to the term violence. M. Demogue has described it as *un fait brutal quelconque, fait de l'homme ou de la nature, ayant déterminé à un acte juridique quelconque*. (Rev. Trim. 1914, p. 442.) And he well states the principle in these terms:—

Lorsqu'une personne agit ou s'abstient sous la pression brutale, soit des événements, soit des faits naturels, (nauffrage, inondation, etc.) soit des actes violents de tiers: particuliers isolés, insurgés, grévistes, belligérants, l'appréciation qu'elle fait, les choix qu'elle exerce entre son intérêt proche et son intérêt plus éloigné n'ont plus socialement la même valeur. Ce choc extérieur diminue la valeur de la décision qu'elle prend. (Rev. Trim. 1914, p. 438.)

In one important class of cases this practice of modifying the contract is well established in the French jurisprudence. This is in the case of contracts to pay a sum of money for the salvage of a ship in distress. If a ship is in great peril and another vessel comes to its assistance it may be necessary to make a bargain as to the terms on which the assistance is to be rendered. And if the master of the salving vessel consents to render assistance only on exorbitant terms, this contract can be annulled on the ground of violence, but the court will at the same time allow a reasonable compensation for the services rendered. (Req. 27 avril 1887.)

D. 88. 1. 263. S. 87. 1. 372, and the numerous cases cited in Rev. Trim. 1914, p. 466.)

Some French writers of high authority support this jurisprudence. Lyon-Caen et Renault, *Traité de Droit Commercial*, 6, n. 1070; Planiol, 2, n. 1076; Beudant, *Contrats et Obligations*, n. 123; Demogue, in Rev. Trim. 1914, p. 467.)

Many writers on the other hand regard it as unsound. (B.-L. et Barde, *Oblig.* 1, n. 78; Aubry et Rau, 5th ed. 4, p. 501, and note 16.)

So far it would seem this is the only kind of case in which the French courts have decided that accidental danger may be violence, and that the contract made under the pressure of this external danger may be modified rather than annulled. It is not a case of varying the remuneration of a mandatary because a mandatary is one who performs juridical acts. (B.-L. et Wahl, *Contrats Aléatoires*, n. 363; Aubry et Rau, 4th ed. 4, p. 634; Planiol, 2, n. 2232; D. N. C. C. art. 1984, n. 17; Grandmoulin, *Contrats*, n. 913.)

And it may be said that this case is exceptional because there is something like a general custom of maritime law in support of the equitable power of the court. The same principle is constantly applied by the Admiralty Court in England in salvage cases. (*The Medina*, 1876, 2 P. D. 5, 45 L. J. Adm. 81; *The Rialto*, 1891, P. 175, 60 L. J. P. 71; *The Port Caledonia*, 1903, P. 184, 72 L. J. P. 60; Kennedy on *Civil Salvage*, 2nd ed. p. 226; Carver's *Carriage by Sea*, 5th ed. s. 347. See *infra*, 2, p. 160.)

In Egypt the Mixed Court of Appeal has held:—

La convention fixant le prix de sauvetage peut être annulée s'il résulte des circonstances que le consentement du capitaine du navire sauvé n'a pas été libre. (C. A. Alex. 22 mars 1899, B. L. J. XI, 166.)

But if the principle is sound as applied to the case of salvage there is no reason why it should not be extended to analogous cases. Nor is it quite so difficult to do so under the Egyptian Code as under the French. The single article in the Egyptian Code attempts no definition of duress. The expression "obtained by duress" in the Egyptian Code is less embarrassing than the term *extorqué par violence* of the French Code. On the whole it would seem that the courts are entitled to interpret the term duress as covering the pressure of external events just as much as the pressure exercised by a human being. (C. C. E. 133/193.)

When a contract is set aside on the ground of the violence of a third party, who should bear the risk?

If John is coerced into a contract with William by the threats of Thomas, there being no collusion between John and Thomas, we have seen that John can get the contract set aside. But suppose it is impossible to restore the parties to the *status in quo ante*. For example, the property which John bought has been destroyed without his fault, and if he gets the contract annulled he cannot return it. Who is to bear the loss? As the French law stands it seems clear that the loss rests where it falls originally and cannot be shifted: that is, in this case it must be borne by William. No doubt, upon general principles, John would have an action of damages against Thomas, but Thomas may be insolvent as well as violent, and this remedy of no value. It is evident enough that there may be an injustice here. John and William are both perfectly innocent persons. But if John came to William and offered to buy his property why should William be victimised if this results in a loss caused by a fact of which William was ignorant, namely, that John was coerced by Thomas? After all it was John who was the first mover in the matter, why should he not bear his share of the loss? The Swiss Code in its treatment of the subject has a careful article upon this point:—

Lorsque les menaces sont le fait d'un tiers et que l'autre partie ne les a ni connues ni dû connaître, celui des contractants qui en est victime et qui veut se départir du contrat est tenu d'indemniser l'autre si l'équité l'exige (art. 29, al. 2). In the silence of the French and Egyptian Codes it is not possible to arrive at this equitable solution.

Deference to ascendants is not fear.

The French Code has an article based on Pothier and the Roman law:—

La seule crainte révérentielle envers le père, la mère, ou autre ascendant, sans qu'il y ait eu de violence exercée, ne suffit point pour annuler le contrat. (C. C. F. 1114.)

The Egyptian Code does not reproduce this article, which is in fact not very helpful. If a person deliberately chooses to act in a certain way because by doing so he desires to please another or not to displease him he cannot be said to be coerced by violence. But on the other hand it must be said that when one person stands to another in a position of dependence, acts of violence or threats made by the superior may be considered to amount to moral violence, though, if the two parties had not stood in this relation

to one another these threats would have been regarded as of too slight a character. The rule that the confidential relations between two persons may make it possible for one of them, without actual violence, to exercise upon the other what is called in the English law "undue influence," a term which will be explained later, is more important than the rule stated in this article of the French Code. (See *infra*, p. 305. Rossel et Mentha, *Droit Civil Suisse*, 3, p. 61; Rev. Trim. 1914, p. 459; B.-L. et Barde, *Oblig.* 1, n. 86.)

All writers in France are agreed that though the article refers only to ascendants it is not intended to be limitative. The same principle applies to the consent given by a wife from the fear of displeasing her husband, by a servant from the fear of displeasing a master, by a nun from respect to her mother superior, and in similar cases. (Aubry et Rau, 5th ed. 4, p. 502, note 17; D. N. C. C. art. 1114, n. 9. See Req. 6 avril 1903, D. 1903: 1. 301.)

The Spanish Code expresses the French law more correctly than the French Code does in saying:—

La crainte de déplaire aux personnes auxquelles on doit soumission et respect n'annulera pas le contrat (art. 1267, al. 4).

Violence applies to unilateral acts.

The principle that the will of a person who acts under the influence of fear cannot be regarded as free applies to unilateral acts such as gifts and wills as well as to contracts. The validity of a testament may be challenged on the ground that it was extorted by violence or procured by *suggestion et captation*. (B.-L. et Colin, *Donations et Testaments*, 1, n. 269; Req. 19 juill. 1878, S. 78. 1. 271, D. 78. 1. 160; Req. 28 oct. 1895, D. 96. 1. 36; Req. 31 juill. 1913, D. 1917. 1. 62.) And when a will has been made by a testator *in extremis*, or greatly enfeebled, a will in favour of a person who is proved to have had a strong influence over him runs much risk of being annulled. (See Bordeaux, 8 mai 1860, D. 60. 2. 129; D. N. C. C. art. 901, nos. 164 *seq.*)

Violence in other laws.

German law.

The rules of the German law before the code upon the subject of violence as a vice of consent were closely analogous to those of the French law. And the German Code lays down the general principle in these terms:—

Celui qui a été déterminé par tromperie dolosive, ou, d'une façon contraire au droit, par menaces, à émettre une déclaration de volonté, peut attaquer par voie d'annulation la déclaration (art. 123).

But this article must be taken in connection with the new equitable rule laid down in the German Code, which makes certain extortionate contracts void and not merely voidable.

Un acte juridique qui porte atteinte aux bonnes mœurs est nul.

*Est nul, en particulier, un acte juridique par lequel quelqu'un, en exploitant le besoin, la légèreté, ou l'inexpérience d'autrui, obtient, pour lui ou pour un tiers, qu'en échange d'une prestation on promette ou que l'on fournisse des avantages patrimoniaux qui excèdent de telle sorte la valeur de la prestation, qu'en tenant compte des circonstances ces avantages soient, par rapport à la prestation, dans une disproportion choquante (art. 138. See Cosack, *Lehrbuch des Deutschen bürgerlichen Rechts*, 6th ed. 1, p. 247, and p. 257; Saleilles, *Déclaration de Volonté*, p. 56; Schuster, *German Civil Law*, p. 110.)*

The case of salvage is provided for in the German Commercial Code, which gives the court power to reduce the amount agreed upon if it is unduly high under the circumstances. (*Handels-gesetzbuch*, art. 741; Schuster, *op. cit.* p. 359.)

English law.

The common law doctrine of duress is much narrower than the continental law of violence. A contract is not voidable for duress except where there has been physical violence, actual or threatened, or imprisonment. It must be committed by the other party to the contract or by someone acting with his knowledge and for his advantage, and the subject of it must be the contracting party himself or his wife, or, perhaps, his parent or child. (See *Skeate v. Beale*, 1840, 11 A. & E. 983, 52 R. R. 558; Pollock, *Contracts*, 8th ed. p. 636; Leake, *Contracts*, 6th ed. p. 282.)

Undue influence.

The English law is stricter than the French law in its requirements as to violence in cases where the parties to the contract challenged stood in no intimate relation to each other. But, on the other hand, the equitable doctrine of undue influence affords relief in a wide class of cases where such a relation exists. And

in the cases in which this doctrine is applicable the English law is more liberal than the French law. for where there is the special relation between the parties there is in the English law a presumption of undue influence. The rule is thus stated by Lord Penzance:—

“ In equity, persons standing in certain relations to one another, such as parent and child, man and wife, doctor and patient, attorney and client, confessor and penitent, guardian and ward, are subject to certain presumptions when transactions between them are brought in question; and if a gift or contract made in favour of him who holds the position of influence is impeached by him who is subject to that influence, the courts of equity cast upon the former the burden of proving that the transaction was fairly conducted as if between strangers, that the weaker was not unduly impressed by the natural influence of the stronger, or the inexperienced overreached by him of more mature intelligence.” (*Parfitt v. Lawless*, 1872, L. R. 2 P. & D. 462, 468, 41 L. J. P. 68.) And the relations specified here are only illustrative. (See *Dent v. Bennett*, 1839, 4 My. & Cr. 269, 277, 48 R. R. 94, 102.) In cases where some special relation of this kind existed between the parties at the time of the contract there is a presumption of undue influence but the doctrine is not limited to such cases. In other cases the burden of proof is on the person challenging the contract. In the words of Lord Kingsdown:—

“ The principle applies to every case where influence is acquired and abused, where confidence is reposed and betrayed. The relations with which the court of equity most ordinarily deals are those of trustee and *cestui que trust*, and such like. (*Cestui que trust* is the curious and rather misleading term which the English law uses to denote the beneficiary under a trust.) It applies specially to those cases, for this reason and for this reason only, that from these relations the Court presumes confidence put and influence exerted. Whereas in all other cases where those relations do not subsist, the confidence and the influence must be proved extrinsically; but where they are proved extrinsically, the rules of reason and commonsense and the technical rules of a court of equity are just as applicable in the one case as in the other.” (*Smith v. Kay*, 1859, 7 H. L. C. 750, 779, 115 R. R. 367, 385. See Leake, *Contracts*, 6th ed. p. 291; Pollock, 8th ed. p. 656.)

CHAPTER XIII.

FRAUD.

The third and remaining vice of consent is fraud.

Distinction in French between *dol* and *fraude*.

IN English the single word "fraud" is used to translate two French words *dol* and *fraude*. This is unfortunate because French writers distinguish *dol* from *fraude* and endeavour to confine the term *dol* to that particular kind of fraud, possessing certain specific characteristics, which constitutes a vice of consent. The more vague word *fraude* they would restrict to other kinds of dishonest dealing, such as the conduct of the debtor who does not try to perform his obligation, or that of an insolvent person who makes alienations which are in fraud of the rights of creditors. (Demolombe, 24, n. 169; Bédarride, *Traité du Dol et de la Fraude*, 4th ed. 1, n. 12; Planiol, 2, n. 1069.)

Such a distinction conduces to clearness of thought, but in fact the terms *dol* and *fraude* are frequently used as synonymous, and the French Code itself employs the word *dol* to describe the bad faith of the debtor in the *execution* of the contract though the other term *fraude* would have been here more appropriate. (C. C. F. 1150; C. C. E. 122/180. See B.-L. et Barde, 1, n. 487.)

Distinction drawn between criminal fraud and civil fraud.

Most French writers distinguish between what they call *dol criminel* and *dol civil*.

Certain kinds of fraudulent conduct are punishable by the penal code, and those they designate as *dol criminel*.

Thus the offences of obtaining property by false pretences—*escroquerie*—and of criminal conversion and breach of trust—*abus de confiance*—are species of frauds. (C. Pén. E. 293, 296/302, 305; C. Pén. F. 405, 408.)

The distinction between *dol criminel* and *dol civil* is commonly

explained by saying that criminal fraud requires a combination of certain elements not all of which are essential to constitute civil fraud. (Larombière, art. 1116, n. 2; Bédarride, *Traité du Dol*, n. 17.) M. Planiol argues with convincing force that this is a misleading way of stating the matter. The penal law does not punish fraud *in itself*. What it punishes is the misappropriation of the property of another. The offender may have stolen it or it may have come into his hands without theft, but, at any rate, he misappropriates it. Obtaining property by false pretences and criminal conversion are, at the bottom, varieties of theft. As M. Planiol says: *C'est le vol qui est un délit et non pas le dol*. (Rev. Crit. 1893, p. 662.) The criminal law has nothing to do with the fraud which creates a mistake and thereby induces a person to consent to a contract.

Fraud as a vice of consent.

The Egyptian Code explains fraud in these terms: *Fraud vitiates consent, when the artifices practised on the party are such that without them he would not have consented*. (C. C. E. 136/196.) This definition does not say, as the French Code does, that the fraud must be by the other party to the contract. This point will be examined later.

Essentials of fraud as vice of consent.

There must be artifices practised and it must be clear that but for these artifices the consent would not have been given; and the fraud must be by the other party, subject to what will be said later upon this head. It is only when the fraud induced the consent that the contract is voidable. Fraud of a less serious kind may, as will be explained later, entitle the person deceived to claim damages, but it will not be a ground for avoiding the contract.

What are "artifices."

The word in the French Code is *manœuvres*. Both terms suggest some deliberate scheme or trick by which the party is led into a mistake. If a seller of birds were to paint the feathers of a common pigeon so as to make it resemble a rare tropical bird this would be an example of "artifices" in the most literal sense. (Giorgi, *Obbligazioni*, 4, n. 99.)

But the law does not require such devices as this. Pothier says: *On appelle dol toute espèce d'artifice dont quelqu'un se sert pour en tromper un autre*. (Oblig. n. 28.)

The French law has always interpreted the word *manœuvres* in a wide sense. Thus M. Demolombe says: *Quant aux moyens, aux ruses et aux artifices, dont le dol se sert pour tromper, il serait bien impossible de les définir et de les prévoir. Que le dol soit positif ou négatif; qu'il entreprenne de faire croire ce qui n'est pas ou de faire ignorer ce qui est; qu'il consiste dans des affirmations mensongères, ou dans des dissimulations ou des réticences fallacieuses, il n'importe.* (24, n. 172.)

There must be specific acts proved which possess, taken together, a certain gravity, and it must be these acts which induced the consent. This is a question of fact in each case.

La constatation et l'appréciation des faits constitutifs de dol, invoqués comme cause de nullité d'une convention, rentrent dans les attributions exclusives des juges du fond, qui prononcent souverainement sur le point de savoir si les manœuvres pratiquées ont été l'élément déterminant du contrat. (Req. 22 févr. 1911, D. 1913. 5. 5.)

In France the *Cour de Cassation* cannot review the facts found by the court below. It can, however, set aside a judgment annulling a contract when the facts as stated by the court below did not constitute fraud in the legal sense, as, for instance, if the artifices were not those of a party to the contract. (B.-L. et Barde, 1, n. 119; Aubry et Rau, 5th ed. 4, p. 508.)

These distinctions do not concern us because the Court of Appeal in Egypt can review both the facts and the law. (See Decree of Reorganisation, arts. 20, 21; Lusena Bey, *Eléments de Procédure Civile*, 1, p. 415.)

"Artifices" imply fraudulent intention.

It is an admitted principle of the French law that fraud implies dishonesty. There must be the intention to deceive. The expression in the code "artifices practised" clearly implies bad faith. (B.-L. et Barde, 1, n. 105; Aubry et Rau, 5th ed. 4, p. 503; Planiol, 2, n. 1061.) Negligence and fraud are different things. And there is no such thing in the French law as a fraud consisting in the prejudice itself suffered by the party. Certain expressions of Ulpian have been understood to mean that in the Roman law there was what has been called *real* or objective fraud as well as personal fraud—*ipsa res in se dolum habet*. (Dig. 45. 1. 36.)

C'est cette lésion, sans dol de personne, qu'on appelle dolum re ipsa, parceque l'un des contractants se trouve trompé par la chose

même, sans le dol de l'autre. (Domat, *Lois Civiles*, 1ère part. liv. 1. tit. 18. sect. 3. n. 4. Cf. Merlin. *Rép.* vo. *Dol*, 1; Toullier, 6. n. 89.)

But this arises from a misapprehension of what Ulpian says. All that he means is that if one party has, even without fraudulent intention, led the other into a mistake and thereby induced him to consent to a contract, the party who induced the mistake cannot compel fulfilment of the contract. He was not guilty of fraud in inducing the contract, but in the circumstances his action to claim performance of it would be fraudulent. In the Roman law, as in the French law, fraud as a vice of consent always means that one party is intentionally deceived by the other. (See Bédarride, *Traité du Dol*, 1. n. 46.)

May a mere false statement amount to "artifices"?

Expressions are used in some cases which suggest that a mere false statement—*le simple mensonge*—is not enough to constitute fraud. Thus in a recent case the Mixed Court of Appeal held: *Par les manœuvres pratiquées contre la partie et ayant vicie son consentement, il faut entendre les procédés frauduleux de nature à surprendre une intelligence ordinaire, et non le simple mensonge dont la vérification est facile pour un homme d'affaires.* (C. A. Alex. 8 déc. 1915, B. L. J. XXVIII, 48.)

But we must not lay down any absolute rule that a mere lie is not enough to constitute fraud. It is a question of circumstances.

In the case just referred to the real ground of decision was that the court was not satisfied that the lie had induced the consent. Certain kinds of lying are in fact so common as to be innocuous. It is a matter of course that the seller of an article extols its merits, and very often he says things about it which are not strictly true. But so long as he confines himself to mere general laudation his statements although false do not amount to fraud. The true reason for this well-settled rule is that the buyer is on his guard and is not deceived by language of this kind.

It is what Larombière well calls a *dol toléré*. (Larombière on art. 1116, n. 5. Cf. Pothier, *Oblig.* n. 30; Aubry et Rau, 5th ed. 4, p. 504; Bédarride, *Traité du Dol*, 1, n. 22; B.-L. et Barde, 1, n. 100; Planiol, in *Rev. Crit.* 1893, p. 571; Riom, 12 mai 1884, S. 85. 2. 13; Rennes, 7 juin 1878. D. 79. 2. 125; C. A. Alex. 3 avril 1897, B. L. J. IX, 263.)

Thus, the seller of an immoveable in his advertisements may

describe its advantages in language of exaggerated laudation, and in the same way, the promoters of a company are wont to paint in rosy colours the prospects of the company, but so long as such people keep to generalities this is not fraud. (Amiens, 14 févr. 1876, *sous* Cass. S. 77. 1. 49; Journal du Palais, 77, p. 113; Paris, 29 janv. 1861, *sous* Cass. D. 62. 1. 429.)

But when the seller makes definite false statements of a specific kind which did in fact lead the other party to give his consent this is fraud, although no special artifices or tricks were used, and there was no special *mise en scène*—to use a phrase employed in the penal law—which helped to make the lie plausible. The question is, did what was done deceive the other and induce him to consent? If it did it was fraud in the legal sense. Any doubt upon this point is excluded by the consideration that even silence may amount to fraud.

Although a false representation of a specific fact is fraud if it induces consent the case will of course be clearer when the lie is corroborated in some way so as to make it more plausible. The following are illustrations:—

A wants to sell shares in a company to B. A has previously given C an option to buy some of these shares at 260 francs each. He gets C to write a letter saying that the price to him was 290 francs, and on the strength of this B buys at 290 francs. (Req. 9 nov. 1910, D. 1910. 1. 528.)

A circular issued by a mutual insurance company to its members is expressed in such a way as to make them think that their consent is asked for to make certain modifications in the rules of the company. In reality what is proposed is to form a new company, and to this many members consent without understanding what they are doing. (Req. 18 déc. 1912, D. 1914. 1. 213.)

A young man is persuaded to buy the exclusive right to publish certain old manuscripts, among which is one by Saint-Simon. The seller calls in the help of a man who falsely claims to be an expert in the publication of such works. In fact the manuscripts are well known and are in the *Bibliothèque Nationale*, and the most important of them is not by Saint-Simon as is pretended, or, at any rate, its authenticity is doubtful. (Req. 31 déc. 1901, D. 1903. 1. 302.)

A young man of no experience is induced to enter into a partnership by being shown a balance sheet which has been knowingly “cooked.” (Req. 27 févr. 1906, D. 1907. 1. 252.)

Induced to enter into partnership

Reticence as fraud.

The general rule is that mere silence does not amount to fraud. It cannot be considered as an "artifice" in the sense of the article in the codes. (B.-L. et Barde, *Oblig.* 1, n. 102; Aubry et Rau, 5th ed. 4, p. 503, note 20; C. A. Alex. 30 mars 1915, B. L. J. XXVII, 250.)

One party to a proposed contract is not, as a general rule, bound to communicate to the other all the information which he has in order that the latter shall be in the best possible position to decide whether he shall give his consent. And, *a fortiori*, there is no duty to communicate a mere opinion. If a man proposes to buy my land in order to build a hotel upon it I am in no way bound to tell him that in my opinion this will be a ruinous speculation.

People who are dealing with each other at arm's length must protect themselves. But this rule is subject to the important qualification that the case must not be one in which the law throws upon the party a duty to disclose material facts of which he is aware. (Planiol, 2, n. 1061; Colin et Capitant, 2, p. 299; Hue, 7, n. 36.)

In some cases the law expressly imposes upon the party to a contract the duty of disclosure. In such cases the mere reticence is fraud, and is called by French writers *dol négatif*. (Bédarride, *Traité du Dol*, 1, n. 62.)

Thus the French Code of Commerce declares that a concealment by the assured if it is of a material kind, annuls an insurance. (C. Comm. Français, 348.)

And though there is no such express provision in the Egyptian Code it is certain that the law is the same.

So, the seller of an immovable is bound to warrant the purchaser against disturbance, and he acts fraudulently if he wilfully conceals from the purchaser causes of eviction, total or partial, or charges which burden the immovable. (See C. C. E. 300/374; C. C. F. 1626; Laurent, 24, n. 269; C. A. Alex. 11 févr. 1909, B. L. J. XXI, 227.)

As Laurent expresses it, *La loi exige, en principe, que le vendeur donne lui-même connaissance des charges en les déclarant.*

And every seller, whether of an immovable or of a moveable, is bound by law to declare the latent defects known to him of the thing which he sells. (C. C. E. 313, 321/387, 396; C. C. F.

1641, 1645; B.-L. et Saignat, *Vente*, n. 425; Aubry et Rau, 4th ed. 4, p. 389.)

So the man who sells a kicking horse and says nothing about this vice, of which he is aware, acts fraudulently. But the buyer has the *onus* of proving that the seller knew of the vice. (Bordeaux, 17 févr. 1874, D. 74. 1. 193; Trib. Civ. de Bordeaux, 9 mai 1910, D. 1912. 2. 97.) And even if a seller stipulates that he sells without warranty this stipulation cannot exonerate him from the liability to pay damages caused by his fraud. (Pothier, *Vente*, n. 210; B.-L. et Saignat, *Vente*, n. 421. See *infra*, 2, p. 261.)

The onerous assignment of a claim is a kind of sale, and the general rules of sale apply to this contract. (B.-L. et Saignat, *Vente*, n. 815; C. C. E. 348/434.)

So in a French case it was held *Qu'une cession de créance consentie au profit du mandataire chargé du recouvrement doit être annulée pour cause d'erreur et de dol, lorsque le cessionnaire a laissé ignorer au cédant les conditions dans lesquelles se trouvait la créance, et qu'il s'est fait ainsi céder à vil prix une créance dont le recouvrement était certain.* (Paris, 16 déc. 1851, et, sur pourvoi, Req. 12 janv. 1863, D. 63. 1. 302.)

And in an Egyptian case where certain Turks who were needy and illiterate persons had assigned to a Greek claims which they had in Egypt for a sum much less than that which the assignee was able to collect, the assignment was set aside on the ground of the concealment by the assignee of material facts. (C. A. Alex. 12 juin 1902, B. L. J. XIV, 347.)

In regard to sale, including assignment, and to insurance, the duty of disclosure and the limitations of that duty are not disputed. In other contracts there is no legal warranty. But, probably, when the contract is not one of sale or insurance the court is entitled to find that owing to special circumstances, such as the relation of the parties to each other, to the ignorance or weakness of one of them, and so forth, there was a duty of disclosure.

Fraud in the French law is a question of fact, and the court has full discretion to decide according to circumstances.

Where the parties are dealing with each other upon a fairly equal footing, and when the victim of the alleged fraud had full opportunities of inspection and inquiry, the court will be slow to annul a contract on the ground of the mere silence of the other party. But when the facts show that the plaintiff relied and

had to rely on what was said to him by the defendant, the court may come to the conclusion that a frank disclosure of all material facts was a legal duty.

The fraud must have induced the consent.

The code is clear that the contract is not voidable unless it was the fraud which induced the consent. The consent of the party has been secured by making him believe something which is not true. It must be in the phrase of the old writers, *dolus dans causam contractui*. This kind of fraud is now commonly called *dol principal*.

Fraud which does not determine the consent—*dol incident*—affords ground for an action of damages, as will be explained later, but it does not render the contract voidable. (Pothier, *Oblig.* n. 31; Larombière, on art. 1116, n. 3; Bédarride, *Traité du Dol*, 1. n. 31, and n. 50.)

Question of fact.

Whether or not the fraud did induce the consent is a pure question of fact.

The court has not to consider whether the fraud would have deceived a reasonable person. As to duress such an objective standard is indicated in the codes, though the importance of this statement is much diminished by the addition that the court may have regard to the age, sex and position of the contracting party. (C. C. E. 135/195; C. C. F. 1112. *Supra*, p. 292.)

But as to fraud the question is entirely relative. Was this particular person, in the circumstances of this case, induced to consent by the deceit of the other party?

The fraud may be one which might well have deceived a shrewd and capable man. On the other hand, it may be one which a shrewd man would easily have detected, and yet it may have deceived the plaintiff.

A young man without business experience may be an easy victim. (Req. 27 févr. 1906, D. 1907. 1. 252; Req. 31 déc. 1901, D. 1903. 1. 302.) A man enfeebled by age, by disease or by habits of intoxication may be easily deceived. (Req. 11 mars 1862, D. 62. 1. 537; Req. 13 déc. 1875, D. 76. 1. 176; Rennes, 6 juin 1881, D. 81. 2. 248.) Women who live secluded lives are less able to protect themselves against fraud than women who are engaged in business. People who are illiterate are more

likely than others to be deceived. (Req. 30 avr. 1902, D. 1902. 1. 288; C. A. Alex. 12 janv. 1902, B. L. J. XIV, 347.)

Moreover, the special relation between the parties, or the habitual dependence of the plaintiff upon the judgment of the defendant, may have made it easier for the fraud to induce the consent. In such cases the line which separates fraud from violence is a narrow one. The court may come to the conclusion that the will of the plaintiff was unduly influenced by that of the defendant, and the result is the same whether it was fear or guile which led him to consent. But even the most artful ruses or the most cunning exploitation of a position of advantage do not constitute fraud if the court is satisfied that they did not induce the plaintiff to consent. His ground of action is that he was led into a mistake, and it fails when it appears that he was aware of the true state of matters and acted with his eyes open. (Rennes, 21 juill. 1880, D. 83. 1. 330; C. A. Alex. 3 juin 1911, B. L. J. XXIII, 351; C. A. Alex. 24 mars 1910, B. L. J. XXII, 211; C. A. Alex. 22 févr. 1912, B. L. J. XXIV, 164.)

Mistake created by the fraud does not need to be essential error.

The effect of fraud as a vice of consent is that it induces a mistake in the mind of one of the parties to a contract. But the mistake which is induced does not need to be a mistake of the kind which is considered as a sufficient ground for annulling the contract for mistake in itself.

Fraud and mistake are separate grounds of nullity.

A mistake as to the value of the thing sold or as to the solvency of the other party is not in the legal sense "essential error," but if such a mistake is induced by fraud the contract may be voidable for fraud.

So, likewise, if a man by representing to me that my horse is dead induces me to buy another horse from him I can get the contract set aside if his statement was fraudulent, though I could not do so if my belief that my horse was dead was a mistake into which I had fallen without any fraud on his part. (Aubry et Rau, 5th ed. 4, p. 507; B.-L. et Barde, 1, n. 117; Colin et Capitant, 2, p. 300.)

The Swiss Code of Obligations expressly says, *La partie induite à contracter par le dol de l'autre n'est pas obligée, même si son erreur n'est pas essentielle* (art. 28). This has always been the French law.

Important to have fraud and mistake as distinct grounds of nullity.

The advantages in retaining the two grounds are:—

(1.) As explained in the preceding paragraph, mistake as to motive is a ground of nullity if it is induced by fraud, but not otherwise;

(2.) It is frequently more easy to prove fraudulent acts than to prove a state of mind.

Fraud as a vice of consent must be the fraud of the other party to the contract or a fraud at which he connived.

We have explained earlier that a man cannot found on his own fraud as a reason for annulling a contract. (*Supra*, p. 207. See C. A. Alex. 20 févr. 1896, B. L. J. VIII, 132.) But can the party deceived by the fraud of a third party—a stranger to the contract—claim to have the contract annulled?

The French Code speaks of *les manœuvres pratiquées par l'une des parties*, and this is in accordance with the old French law and with the Roman law. (C. C. F. 1116; Pothier, *Oblig.* n. 23, and n. 32; Dig. 44. 4. 2. 1; Code, 4. 44. 5; Girard, *Manuel*, 5th ed. p. 462.)

The Egyptian codes in the French and in the English translation do not say that the fraud must be by the other party. (C. C. E. 136—196.)

But the Arabic version says distinctly “artifices practised by the other party.”

Upon such a point this may well be considered as conclusive. It is permissible to refer to the French version when the Arabic text is ambiguous, but when the Arabic text is quite clear it must receive effect when, as in this case, it agrees with the French law. (See as to the use of the French translation of the codes, Circular of the Committee of Judicial Surveillance of 20 Dec. 1908 (No. 8), in O. B. X, n. 104; Court Cass. 19 janv. 1918, O. B. XIX, n. 19.) *The Arabic version of the codes is technically “official,” but it is in fact a translation of the French version, and the law is of French origin.* And the jurisprudence is in favour of the traditional view. It has been held that shareholders in a company who alleged that they had been induced to take shares by fraudulent statements in the prospectus could not claim rescission as against the syndic representing the creditors when the company was in liquidation. (C. A. Alex.

15 mai 1912, B. L. J. XXIV, 341. Cf. Req. 10 févr. 1868, D. 68. 1. 379; Paris, 9 mai 1877, D. 79. 2. 81.)

The rule that the fraud of a third party is not a ground for annulling a contract is reasonable. Why should the other party to the contract who was *ex hypothesi* innocent suffer loss because the party with whom he contracted was deceived? The victim of the fraud can claim damages from the person who deceived him. (B.-L. et Barde, 1, n. 109; Aubry et Rau, 5th ed. 4, p. 505.)

The modern codes agree. (Code Féd. Oblig. art. 28; German Code, art. 123; Code Maroc. Oblig. art. 52.)

But in interpreting what is meant by the fraud "of the other party" the French law decides that the fraud of a representative is the fraud of the person whom he represents. The principal or the pupil cannot maintain a contract which his agent or his tutor has procured by fraud. (Aubry et Rau, 5th ed. 4, p. 506; B.-L. et Barde, 1, n. 112; Cass. 21 mars 1893, S. 95. 1. 241, where see the criticism by M. Wahl; Cass. 4 déc. 1899, D. 1900. 1. 14.)

If I induce someone to make false statements to a party from whom I wish to buy a property the effect of which is to cause him to believe that it is of less value than he supposed, and in consequence, he sells it to me for a lower price, he can get the contract set aside just as if I had made the statements myself. But the law goes further than this. If I am aware that the other party has been deceived by a third party I am not allowed to take advantage of this. It is my duty to correct the mistake before I deal with him. The French writers are agreed upon this point. (Demolombe, 24, nos. 185, 186; Aubry et Rau, 5th ed. 4, p. 506; B.-L. et Barde, 1, n. 109; Bédaride, *Traité du Dol*, 1, n. 36.)

Some modern codes with good reason go a step further in saying that the contract is voidable when the party knew *or ought to have known* that the other had been induced to consent by the fraud of a third party. (German Code, art. 123; Code Féd. Oblig. art. 28.) There is a decided gain from the practical point of view in formulating the rule in the way the German and Swiss Codes have done. It is difficult to prove that a man knew some fact, but it may be easy to prove that a man of reasonable carefulness in his situation would have known it. The Code of Morocco declines to take this step. (Code Maroc. Oblig. art. 52.)

If more than two parties are concerned in the contract, and

the consent of one of them is induced by the fraud of one only of the others, and if the contract cannot be annulled without affecting the rest, the contract stands. Thus, if a man is induced to enter a partnership by the fraud of one of the partners only, the others being completely unaware of it, he cannot get the contract annulled. (Demolombe, 24, n. 183; Aubry et Rau, 5th ed. 4, p. 506; B.-L. et Barde, 1, n. 111. *Contra*, Hue, 7, n. 38.) So, in Egypt, it has been held: *Le dol commis par un seul des copartageants ne peut entraîner la nullité du partage, à raison de son indivisibilité, sauf le droit pour la partie lésée de recourir contre l'auteur du dol en réparation du préjudice causé.* (C. A. Alex. 29 mai 1913, B. L. J. XXV, 417.)

When fraud is that of representative, is principal liable in damages?

This question must be answered in the negative. The person represented cannot take the benefit which his representative has fraudulently procured, but he is not liable in damages unless there was personal fault on his part. (B.-L. et Barde, 1, n. 112; Aubry et Rau, 5th ed. 4, p. 506, note 28; *Dissertation* by M. Planiol on D. 93. 1. 433. In the contrary sense, *Dissertation* by M. Wahl on S. 95. 1. 241.)

Contract induced by fraud of third party may be annulled for mistake.

When the mistake into which the party has been led was essential, in the sense explained in discussing mistake, it is possible for him to get the contract annulled upon the ground of mistake simply without the necessity of alleging and proving that the mistake was caused by the fraud of a third party. (Larombière, art. 1116, n. 9; B.-L. et Barde, 1, n. 114; Planiol, 2, n. 1064.)

Rule that fraud must be that of other party applies to contracts only.

The language of the codes shows clearly that they are speaking only of contracts. The articles speak of the "parties" and of their "consent." It follows that this rule has no application to juridical acts which are not contracts, such as the acceptance of a succession or the admission of the paternity of a child. Such acts may be annulled on the ground of fraud though it is not the fraud

of the person who is to benefit directly by the act in question. (Laurent, 15, n. 529; Aubry et Rau, 5th ed. 4, p. 505, note 26. Cf. German Code, art. 122.)

Different rule as to duress.

Although the fraud of a third party is not a ground for annulling a contract the rule is different as to violence. (See *supra*, p. 299.)

Principal fraud and incidental fraud.

The kind of fraud which is spoken of in the article under consideration is fraud without which the other party would not have given his consent to the contract at all. It is in the traditional phrase *dolus dans causam contractui*. Modern writers describe this as *dol principal*. But there may have been fraud of a less serious nature than this, fraud which has deceived the plaintiff and has induced him to accept more onerous terms than he would have done otherwise. He would, it is true, have consented apart altogether from this fraud, but all the same the fraud has caused him prejudice.

Fraud of this kind is called by the old writers *dolus incidens*, and by the moderns *dol incident*—incidental or accidental fraud. It is not a ground of nullity but it entitles the victim to claim damages. (Laurent, 15, n. 523; Aubry et Rau, 5th ed. 4, p. 504; B.-L. et Barde, 1, n. 115, 116; R  q. 27 avril 1906, D. 1907. 1. 252.)

The Morocco Code expresses it thus: *Le dol qui porte sur les accessoires de l'obligation et qui ne l'a pas d  termin  e ne peut donner lieu qu'   des dommages-int  r  ts*. (Oblig. art. 53.)

But a fraud relating to some detail or minor matter may nevertheless have been so important in the mind of the party as to induce him to consent to the contract. If so it will be *dol principal* in the French law. (Laurent, 15, n. 523; Hue, 7, n. 37.)

Proof of fraud.

According to the French law, fraud may be proved by witnesses and by presumptions, and the Egyptian law is the same though there is no express provision to that effect corresponding to C. C. F. 1353.

Fraud is a kind of delict, as Domat says, and unless it could be proved by presumptions it would generally go unpunished.

(*Lois Civiles*, 1ère part. liv. 1, tit. 18, s. 3, n. 3; C. C. F. 1353; B.-L. et Barde. 1, n. 118; Aubry et Rau, 5th ed. 4, p. 507; Bédarride, *Traité du Dol*, 4th ed. 1, n. 9; Req. 21 oct. 1885, D. 86. 1. 403; Req. 17 juill. 1906, D. 1907. 1. 247; C. A. Alex. 13 janv. 1904, B. L. J. XVI, 101; C. A. Alex. 15 avril 1909, B. L. J. XXI, 383.)

But it is only fraud in inducing contract which is an exception to the rules of evidence, and not fraud in the execution of the contract. (C. A. Alex. 14 janv. 1916, B. L. J. XXIX, 114. Cf. Bédarride, *Traité du Dol*, 4th ed. 1, n. 241; Planiol, in *Rev. Crit.* 22, p. 550.)

And the court will require proof of specific acts; it will not be satisfied with vague allegations of fraud. *La partie qui pour faire annuler un acte prétend qu'il serait entaché de dol doit articuler des faits précis et circonstanciés d'où le dol résulterait, et ne peut se borner à des allégations vagues.* (C. A. Alex. 29 mai 1913, B. L. J. XXV, 417. Cf. Req. 21 oct. 1885, D. 86. 1. 403.)

The party who claims the contract is voidable must state precise facts & circumstances from which the dol will necessarily result. It is not sufficient to allege that the contract is voidable.

CHAPTER XIV.

FRAUD AND MISREPRESENTATION IN ENGLISH LAW.

THE discussion of the kind of misrepresentation which renders a contract voidable is more difficult and complicated in the English law than it is in the French law. On the whole, the English law is more liberal in its remedies.

We have to employ two terms "fraud" and "misrepresentation," because the English law, subject to certain conditions, allows a contract to be rescinded on the ground that it was induced by a misrepresentation, although this misrepresentation was innocently made. But certain other remedies are, as we shall see, open only in cases of actual fraud.

Equity and common law.

The difficulty of the subject is largely due to the fact that prior to 1873 there existed in England separate courts of equity which had remedies and rules of their own different from those of the courts of common law. Some important matters such as trusts were left exclusively to the courts of equity. Other matters, such as fraud and misrepresentation in contracts, had to be dealt with both by the courts of equity and the courts of common law.

A suitor in some cases had his choice of going to either court. In other cases there might be a remedy open to him in the court of equity though there was none in the courts of common law. (See *per* Lord Haldane, L.C., in *Nocton v. Ashburton*, 1914, A. C. 932, 83 L. J. Ch. 784, 792.)

Legal fraud.

The remedies applied by the two courts were not the same, nor did they understand the term "fraud" in the same sense. The courts of equity naturally took cognisance of fraud of the gross and palpable kind. But they gave relief also where the conduct

of the defendant was not such as the ordinary courts would consider fraudulent. The breach of a special duty arising out of a confidential relationship between the parties was called "fraud." "Fraud in such cases is *nomen generalissimum* and it must be construed as extending to transactions in which the court is of opinion that it is unconscientious for a person to avail himself of the legal advantage which he has obtained. (*Per* Lord Haldane, L.C., *ib.* p. 793.) Equity lawyers came to speak of "constructive fraud" and even of "legal fraud," by which singularly inapt expression was meant a kind of conduct which the law considered as fraudulent, though there was no intention to cheat.

It was "not moral fraud in the ordinary sense, but breach of the sort of obligation which is enforced by a court that from the beginning regarded itself as a court of conscience." (*Per* Lord Haldane, L.C., in *Nocton v. Ashburton*, 1914, A. C. 932, 83 L. J. Ch. 784, 794. See Pollock, *Contracts*, 8th ed. 556; Snell, *Equity*, 17th ed. chapter XXX.)

On the other hand, a great master of the common law said: "I do not understand 'legal fraud.' To my mind it has no more meaning than legal heat or legal cold, legal light or legal shade."

Bramwell, L.J., in *Weir v. Bell*, 1878, 3 Ex. D. 238; 47 L. J. Ex. 704.)

In the latest stage of the history, at any rate, the courts of equity are not to be regarded as applying a system of law inconsistent with that applied by the common law courts. It was a supplementary and not a contradictory system. Each court had its peculiar province. In the exercise of their power to apply certain general equitable principles the courts of equity were able in certain cases to grant a relief which it was not in the power of the courts of the common law to afford. Equity stepped in "simply because in certain cases where common justice demanded a remedy the common law had none forthcoming." (*Per* Lord Dunedin in *Nocton v. Ashburton*, 1914, A. C. 932, 83 L. J. Ch. 784, 799.)

Different remedies in courts of equity and courts of law— action of deceit.

Thus where damage had been caused to A by his acting upon a false representation wilfully or recklessly made to him by B, A had an action either in the court of equity or the court of common law. Theoretically the Court of Chancery could not grant him damages but it could order restitution, and the result was

much the same. If the action was brought at common law it was often called by the old name of "action of deceit"; if it was brought in equity it was described as "an equitable claim for damages in the nature of, or analogous to, an action of deceit." (*Peek v. Gurney*, 1873, L. R. 6 H. L. 377, 43 L. J. Ch. 19. See Pollock, *Torts*, 10th ed. 203, 292; Street, *Foundations of Legal Liability*, 1, 374; Salmond, *Torts*, 4th ed. 494.)

Effects of innocent misrepresentation in courts of common law.

On the other hand, when a party to a contract had been induced to consent to it by a false representation made to him by the other party but made innocently, or, where his consent had been induced by the non-disclosure by this party of a material fact, there was at common law no remedy unless (a) the contract was one of the group described as contracts *uberrimæ fidei*—a term explained later; or (b) the false representation had been made a term or condition of the contract. For it might appear from the circumstances that the parties intended a certain statement to be a condition of the contract though it was not expressly included in it. (*Behn v. Burness*, 1862, 3 B. & S. 751, 32 L. J. Q. B. 204, 124 R. R. 794.)

Thus in one case the action was for the price of a quantity of hops sold by the plaintiff. The defendant could not make use of hops if sulphur had been used in their growth and the plaintiff knew this. The defendant before buying asked if sulphur had been used and the plaintiff said "No." In fact sulphur had been used in 5 out of 300 acres, and the sulphured hops had been mixed with the rest so as to be indistinguishable. The jury found that there was no wilful misrepresentation, but it was held that the representation that no sulphur had been used was intended to be a vital condition of the contract. (*Bannerman v. White*, 1861, 10 C. B. N. S. 844, 31 L. J. C. P. 28, 128 R. R. 953. See Pollock, *Contracts*, 8th ed. 560.)

Effects of innocent misrepresentation in courts of equity.

In equity the effects of innocent misrepresentation of a material fact were wider than at common law in two ways:

(1) If the party who had made the misrepresentation claimed specific performance of the contract the court refused to grant it on the ground that he was not acting conscientiously in seeking

to enforce a contract induced by a representation which was not true. (*Redgrave v. Hurd*, 1881, 20 Ch. D. 1, 51 L. J. Ch. 113; *Lamare v. Dixon*, 1873, L. R. 6 H. L. 414, 43 L. J. Ch. 203.)

(2) The court of equity had power to rescind a contract induced by innocent misrepresentation. (*Ross v. Estates Investment Co.*, 1868, 3 Ch. App. 682, 37 L. J. Ch. 873. See cases cited in *Laws of England*, vo. *Misrepresentation and Fraud*, p. 687.)

Whether this rule was limited to certain classes of contracts is not quite clear. But this question has now only an historical interest because since the Judicature Acts the rule applies to all contracts. (*Newbigging v. Adam*, 1887, 34 Ch. D. 582, 56 L. J. Ch. 275. See Anson, *Contracts*, 14th ed. p. 188.)

Fusion of law and equity.

By the Judicature Acts of 1873 and 1875, which came into effect in the latter year, this singular dual system of courts was abolished and a single High Court created which was in future to apply both the rules of equity and the rules of common law, and if there was any conflict between these rules, the rules of equity were to prevail. (36 & 37 Vict. c. 66, s. 24 and s. 25. See Holdsworth, W. H., *History of English Law*, I, p. 402; Maitland, F. W., *Equity*, p. 15.)

Since this fusion of law and equity an innocent misrepresentation which induces consent is a ground for rescission of any kind of contract. But such a misrepresentation is not a ground for an action of damages unless there was a confidential relationship between the parties which created a special duty. (*Nocton v. Ashburton*, 1914, A. C. 932, 83 L. J. Ch. 784; *Derry v. Peck*, 1889, 14 App. Ca. 337, 58 L. J. Ch. 864.)

It is still important therefore to distinguish between a fraudulent and an innocent misrepresentation.

The question whether a particular statement was fraudulent is one of fact, but the English courts have in a long series of cases examined and discussed the nature of fraud and the decisions upon this matter are accepted as binding. This fact alone makes the subject of fraud greatly more technical than it is in the French law, where a wide interpretation is given to the language of the code, and where the question whether the facts proved amount to *dol* is treated as a pure question of fact in each particular case, so that the *Cour de Cassation* will not interfere with

the findings of the *juges du fond*. (Req. 27 avr. 1906, D. 1907. 1. 252.)

We shall examine very briefly (1) fraud, and (2) innocent misrepresentation.

Fraudulent misrepresentation.

The constituent elements of a fraudulent misrepresentation are, according to the English cases, as follows:—

(1) There must be a false representation of a material fact or an “active concealment” of such a fact. A mere statement of an opinion is not a misrepresentation. Moreover, considerable latitude is allowed to a man in praising his own wares, but definite misstatements of material facts are false representations. (Cf. *Central Rail. Co. of Venezuela v. Kisch*, 1867, L. R. 2 H. L. 99, 113, 36 L. J. Ch. 849; *Dimmock v. Hallett*, 1866, 2 Ch. App. 21, 36 L. J. Ch. 146.)

An omission to say something is not a false representation unless “there is such a partial and fragmentary statement of fact, as that the withholding of that which is not stated makes that which is stated absolutely false.” (Per Lord Cairns in *Peek v. Gurney*, 1873, L. R. 6 H. L. 377, 403, 43 L. J. Ch. 19, 40. Cf. *per* Lord Chelmsford, *ibid.* p. 33.)

In a case where the defendant had recommended a man as a proper person to be a commercial agent, it was said: “If a man, professing to answer a question, selects those facts only which are likely to give a credit to the person of whom he speaks, and keeps back the rest, he is a more artful knave than he who tells a direct falsehood.” (Chambre, J., cited with approval by Park, J., in *Foster v. Charles*, 1830, 6 Bing. 396, 403, 31 R. R. 446. 452.)

“Half the truth is a lie.”

But a man who says nothing at all does not make a false representation unless he is guilty of what is called in the English law “active concealment,” such as using artifices to conceal defects in things sold. (*Schneider v. Heath*, 1813, 3 Camp. 506, 14 R. R. 825. See *Ward v. Hobbs*, 1878, 4 App. Ca. 13, 48 L. J. C. P. 281; Benjamin on *Sale*, 5th ed. p. 490.)

An American case decided by the Supreme Court of the United States is a strong illustration of the rule that mere silence is not fraud. The buyer of a quantity of tobacco knew that peace had been declared between the United States and England. The seller did not know this fact and asked the buyer if there was any news

affecting the market price. The buyer gave no answer and the seller did not insist on having one. It was held that the silence of the buyer was not a fraudulent concealment. (*Laidlaw v. Organ*, 1817, 2 Wheat. 178, cited in Pollock, *Contracts*, 3rd Amer. ed. p. 683; and in Benjamin on *Sale*, 5th ed. p. 448, and p. 491.)

There is one important case in which silence is considered as equivalent to active misrepresentation. This is when a man makes a statement honestly believing it to be true but discovers later that it was untrue. It is in such a case a fraudulent concealment for him to refrain from disclosing the truth to the other party and thus to allow him to go on with the transaction relying on the statement being true. "No man ought to seek to take advantage of his own false statements." (*Per* Jessel, M.R., in *Redgrave v. Hurd*, 1881, 20 Ch. D. 1, 12, 51 L. J. Ch. 113. See *Arkwright v. Newbold*, 1880, 17 Ch. D. 301, 49 L. J. Ch. 684.)

If representation is false and known to be so, a dishonest motive is essential.

The motive of the representor is not material. If he makes a false representation knowingly or recklessly he must take the consequences. He may have acted with the intention of injuring the other party or to benefit himself without injuring the other, or with no rational motive at all and out of mere caprice or stupidity. (*Foster v. Charles*, 1830, 6 Bing. 396, 31 R. R. 446; *Smith v. Chadwick*, 1884, 9 A. C. 187, 53 L. J. Ch. 873; *Wilkinson v. Downton*, 1897, 2 Q. B. 57, 66 L. J. Q. B. 493, case of a practical joke.)

The rule that a bad motive is not necessary is illustrated by the following case:—

A bill of exchange was presented for acceptance at the office of the drawee. A accepted the bill as agent for the drawee believing that the acceptance would be sanctioned but having no authority to sign for the drawee. It was held A was liable in an action of deceit brought against him by an indorsee for value. (*Polhill v. Walter*, 1882, 3 B. & A. 114, 37 R. R. 344.)

(2) The representation must be known to be false or must be false and made recklessly—for instance without any knowledge on the subject and without taking the trouble to ascertain if it is true or false. (See *per* Lopes, L.J., in *Derry v. Peek*, 1888, 37 Ch. D. 541; 57 L. J. Ch. 347, 362; *per* Cotton, L.J., 57

L. J. Ch. 353; *per* Lord Bramwell in *Derry v. Peek*, 1889, 14 App. Ca. 337, 58 L. J. Ch. 864, 873.)

(3) It must be made with the intention that the person misled should act upon it, and he must in fact act upon it and thereby suffer damage.

Upon the first point it has been held that the prospectus of a company is presumably intended to invite persons to apply for allotments of shares and not to induce people to buy shares on the market. Only allottees can found on the misrepresentation. (*Peek v. Gurney*, 1873, L. R. 6 H. L. 377, 43 L. J. Ch. 19. Cf. Trib. civ. Seine, 3 août 1897, D. 98. 2. 51.)

But it is a question of fact whether the representation was confined to original allottees. It may be proved that the prospectus was aimed at other people as well. (*Andrews v. Mockford*, 1896, 1 Q. B. 372, 65 L. J. Q. B. 302.)

(4) Is a misrepresentation fraudulent when it was untrue in fact but believed by the maker of it to be true, though he had no reasonable grounds for such belief?

This question has been answered in the negative by the highest court in England in what is now the leading case upon the subject of fraud. The directors of a tramway-company issued a prospectus stating that the company had the right to use steam-power. As a fact the company could not use steam-power without the consent of the Board of Trade, and this consent was afterwards refused. The directors, when they issued the prospectus, had strong grounds for believing that the consent would be given. The House of Lords held, reversing the decision of the Court of Appeal, that the statement of the directors was not fraudulent, being made in the honest belief that it was true, though they had no reasonable grounds for this belief. (*Derry v. Peek*, 1889, 14 A. C. 337, 58 L. J. Ch. 864.)

According to the principles of English law a decision of the House of Lords settles the law, and is binding upon the House of Lords itself, and upon all inferior courts. (See Salmond, *Jurisprudence*, 5th ed. p. 164.)

But it is perhaps *not* presumptuous to regret that the House of Lords took so conservative a view, and did not carry the law a step forward. It may well be argued that a man who honestly makes a false statement upon which he intends another to act must be taken to warrant that he has reasonable grounds for his belief that the statement is true. It was explicitly stated that

there was liability in the cases "where a person within whose special province it lay to know a particular fact, has given an erroneous answer to an inquiry made with regard to it by a person desirous of ascertaining the fact for the purpose of determining his course accordingly." (*Per* Lord Herschell, 58 L. J. Ch. at p. 879.) It does not seem a long step from this to the case of a director holding out representations to the investing public. (See *per* Lord Shaw in *Nocton v. Ashburton*, 83 L. J. Ch. at p. 803.)

And in the case of *Derry v. Peek* it was, if one may say so, straining the facts to find that the directors believed their statement to be true. On the contrary, they knew it was not true. The consent of the Board of Trade had not been given, and they knew that this consent was necessary. What they honestly believed was that the consent was sure to be given. (See the criticism of *Derry v. Peek* by Sir F. Pollock in 5 Law Quarterly Review, 410, and the reply by Sir William Anson in 6 Law Quarterly Review, 72. Cf. Street, *Foundations of Legal Liability*, 1, p. 403.)

In America there are a number of jurisdictions in which the principle of *Derry v. Peek* is not accepted. (See Street, *Foundations of Legal Liability*, 1, p. 407.) That the decision in *Derry v. Peek* was considered dangerous from the practical point of view is clearly shown by the fact that an Act of Parliament was at once passed to abrogate the rule laid down in that case so far as it applies to statements made in a prospectus. Directors who make untrue statements in the prospectus of a company are liable to persons subscribing to shares on the faith of untrue statements made therein, unless the defendants can show that they had reasonable grounds for believing the statements to be true. (Directors' Liability Act, 1890, re-enacted in sect. 84 of the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69). See Pollock, *Torts*, 10th ed. 308.)

The rule of *Derry v. Peek* is still the law except as to representations made by directors in a prospectus, but this is subject to the explanation given in the following paragraph.

(5) Negligence in a statement made by a person having a fiduciary duty to one who acts on the faith of the statement is a ground for an action of damages if it induces a contract to the advantage of the representor. This rule, laid down in a recent case decided by the House of Lords, considerably narrows the scope of the decision in *Derry v. Peek*.

The Court of Chancery before the Judicature Acts had been

accustomed to grant relief where a person occupying a position of guardian or trustee or confidential adviser had obtained a contract to his own advantage.

In such cases proof of fraudulent intention was not required. The question was whether there had been a breach of the special duty. It is now settled that this is still the law, and that the rule of *Derry v. Peek* must not be understood as applicable to cases of this class.

Nothing short of proof of a fraudulent intention in the strict sense will suffice to maintain an action of deceit, but an action of damages for negligence may lie, without evidence of an actual intention to deceive, where a confidential relationship exists, such as that of solicitor and client, so that the person to whom a representation was made was entitled to rely and did in fact rely upon it, and sustained damage in consequence.

The necessity of proving moral fraud in order to succeed in the action of deceit has not narrowed the scope of this remedy. (*Nocton v. Ashburton*, 1914, A. C. 932, 83 L. J. Ch. 784.)

Remedies for fraud or for breach of special duty.

Where a person has been induced to contract by a fraudulent misrepresentation or by a misrepresentation which, although not fraudulent in the strict sense, was nevertheless a breach of the special duty created by the relationship between the parties, the person damaged has a choice of remedies.

(1) He may affirm the contract and bring an action of damages for the misrepresentation. Until he exercises his election the contract remains valid. (*Oakes v. Turquand*, 1867, L. R. 2 H. L. 325, 36 L. J. Ch. 949.)

(2) He may bring an action to rescind the contract with or without damages. But this right to demand rescission is subject to certain conditions: (a) He cannot claim rescission of the contract unless the fraudulent misrepresentation was made by the other party or by his agent acting within the scope of his employment or authority. The remedy of rescission is not open on the ground of the fraud of a third party. (*Masters v. Ibberson*, 1849, 8 C. B. 100, 18 L. J. C. P. 348; *Pulsford v. Richards*, 1853, 17 Beav. 87, 99 R. R. 48.) But if an agent in the course of his employment fraudulently induces a third party to make a contract the fraud of the agent is the fraud of the principal. It is immaterial that the agent was seeking to benefit himself and not his principal. (*Lloyd v. Grace*, 1912, A. C. 716, 81 L. J.

K. B. 1140; *Barnett Hoares & Co. v. S. London Tramways*, 1887, 18 Q. B. D. 815, 56 L. J. Q. B. 452. See *Blackburn v. Vigors*, 1887, 12 App. Ca. 531, 57 L. J. Q. B. 114; Leake, *Contracts*, 6th ed. 256; Anson, *Contracts*, 14th ed. 421. (b) The right to rescission must not have been lost by the plaintiff's acquiescence in the contract, which acquiescence may be inferred from delay. (See confirmation of voidable contracts, *supra*, p. 224.) (c) It must be possible to restore the *status in quo ante* by the parties restoring to each other what they have received under the contract. The plaintiff cannot claim rescission if he has acquired something under the contract which he has lost or destroyed or otherwise put it out of his power to restore. (*Sheffield Nickel Co. v. Unwin*, 1877, 2 Q. B. D. 214, 46 L. J. Q. B. 299; *Clough v. London & North Western Railway Co.*, 1871, L. R. 7 Ex. 26, 41 L. J. Ex. 17; Leake on *Contracts*, 6th ed. p. 260.) (d) No *jus tertii* must have arisen which would make it unjust to grant rescission. Innocent third parties who have dealt with the parties to the contract relying upon its validity are not to be prejudiced. So, for example, if a person having obtained goods by a fraud upon the seller transfers them to a third party who has no knowledge of the fraud the third party has a valid title. (*Sale of Goods Act*, 1893 (56 & 57 Viet. c. 71), s. 23; *Babeock v. Lawson*, 1880, 5 Q. B. D. 284, 49 L. J. Q. B. 408.)

Where the right to rescind has been lost the remedy is an action of damages against the author of the fraud. (*Sheffield Nickel Co. v. Unwin*, *ut supra*.)

(3) Lastly, the person defrauded may resist any action to enforce the contract and ask for a declaration that it is void. (*Aarons Reefs, Ltd. v. Twist*, 1896, A. C. 273, 65 L. J. P. C. 54.)

Innocent misrepresentation.

Contracts *uberrimæ fidei*.

At common law, as above mentioned, there were certain contracts in which the law required the utmost honesty and frankness. They are commonly designated as contracts *uberrimæ fidei*. A contract of this class is liable to be rescinded upon proof of mere non-disclosure of a material fact. In these contracts one of the parties possesses, or is presumed to possess, special knowledge which the other party cannot have, and there is thrown upon the former on this account a positive duty of communication. In ordinary contracts one party is bound not to deceive the other by

false representations, but he is not bound to disclose all the facts known to him which may influence the judgment of the other. In these contracts, on the other hand, he has this positive duty to disclose all the material facts within his knowledge.

In the following classes of contracts it is settled that this duty of disclosure exists, and it is possible that the courts may apply the same principle in other cases in which one party is bound to rely upon information furnished to him by the other. (See Pollock, *Contracts*, 8th ed. p. 560.)

(a) Contracts of insurance.

The rule applies to contracts of insurance of any kind, marine, life, fire, etc. (*Seaton v. Heath*, 1899, 1 Q. B. 782, 682, 68 L. J. Q. B. 631.) As to marine insurance the rule is now embodied in the Marine Insurance Act, 1906 (6 Edw. 7, c. 41, ss. 17—21). And the Act adds, “the assured is deemed to know every circumstance which, in the ordinary course of business, ought to be known by him.” (Sect. 18.)

The Act defines “materiality” in this way: “Every circumstance is material which would influence the judgment of a prudent insurer in fixing the premium or determining whether he will take the risk.” (Sect. 18. See, for illustrations, cases cited in Halsbury, *Laws of England*, vo. *Insurance*, p. 413.)

In life and fire policies the concealment of a material fact makes the policy voidable. It is, however, commonly the case that the policy itself lays down a rule even more stringent by providing that the declarations of the assured or certain of them shall be the basis of the contract. The effect of such a provision is that the contract can be avoided upon proof that the declaration was not true in fact, although it may be that the assured neither knew nor could be expected to know that it was not true. (See *Macdonald v. Law Union Insurance Co.*, 1874, L. R. 9 Q. B. 328, 43 L. J. Q. B. 131; *London Assurance Co. v. Mansel*, 1879, 11 Ch. D. 363, 48 L. J. Ch. 331; *Joel v. Law Union*, 1908, 2 K. B. 863, 77 L. J. K. B. 1108; Anson, *Contracts*, 14th ed. pp. 183, 195.)

(b) Sales of land.

In these contracts a misdescription materially affecting the title, character or value of the premises sold, makes the contract voidable. And non-disclosure may be such a misdescription. (*Flight v. Booth*, 1834, 1 Bing. N. C. 370, 41 R. R. 599;

Phillips v. Caldclough, 1868, L. R. 4 Q. B. 159, 38 L. J. Q. B. 68; *Molynse v. Hautrey*, 1903, 2 K. B. 487, 72 L. J. K. B. 873; Pollock, *Contracts*, 8th ed. p. 571.)

(c) Contracts preliminary to "family settlements" and compromises.

In such cases "there must not only be good faith and honest intention, but full disclosure; and without full disclosure, honest intention is not sufficient." (*De Cordova v. De Cordova*, 4 App. Ca. 692; *Gordon v. Gordon*, 1816, 3 Swanst. 463, 19 R. R. 241.)

(d) Contracts for the purchase of shares in companies.

Those who issue a prospectus inviting people to take shares are bound not to omit facts within their knowledge, "the existence of which might in any degree affect the nature, or extent or quality of the privileges and advantages which the prospectus holds out as inducements to take shares." (*Kisch v. Central Rail. Co. of Venezuela*, 1867, L. R. 2 H. L. 99, 36 L. J. Ch. 849. See, generally, as to the duty of disclosure in this case, Lindley on *Companies*, 6th ed. 1, pp. 88, 114, 485.)

The mere non-disclosure may not be "fraud," but it is a ground for setting aside the allotment of shares. (*Peck v. Gurney*, 1873, L. R. 6 H. L. 377, 43 L. J. Ch. 19. See *supra*, p. 327.)

(e) Suretyship and partnership.

The contract of suretyship is not as such a contract *aberrimæ fidei*. (*Seaton v. Heath*, 1899, 1 Q. B. 782, 68 L. J. Q. B. 631; *Railton v. Mathews*, 1844, 10 Ch. & F. 934, 59 R. R. 308; *London General Omnibus Co. v. Holloway*, 1912, 2 K. B. 72, 81 L. J. K. B. 603.)

But in the case of suretyship the surety has the right to know of any act done by the creditor which is inconsistent with the surety's rights, or of any new facts about the debtor which have come to the knowledge of the creditor and are of such a kind as would entitle the surety to avoid his contract. (*Burgess v. Eve*, 1872, L. R. 13 Eq. 450, 41 L. J. Ch. 515; *Phillips v. Foxall*, 1872, L. R. 7 Q. B. 666, 41 L. J. Q. B. 293; Pollock, *Contracts*, 8th ed. p. 567; Halsbury, *Laws of England*, vo. *Guarantee*, pp. 539, 542.)

And in the case of partnership each partner is bound in dealing with the other partners to disclose all material facts. (See *Law v. Law*, 1905, 1 Ch. 140, 74 L. J. Ch. 169; Lindley on *Partnership*, 8th ed. p. 364; Snell, *Equity*, 17th ed. p. 440.)

Right to claim rescission.

In contracts *uberrimæ fidei* either positive innocent misrepresentations or misrepresentations by non-disclosure, and in other contracts innocent misrepresentations of a positive kind, entitle the party deceived to rescind the contract. But the right to claim rescission is subject to the conditions just explained as applicable in the case of fraud, with the addition that rescission will not be granted on the ground of an innocent misrepresentation if the contract has been executed. If, for example, a lessee has taken possession, it is too late to rescind the lease. (*Angel v. Jay*, 1911, 1 K. B. 666, 80 L. J. K. B. 458; *Seddon v. North Eastern Salt Co.*, 1905, 1 Ch. 326, 74 L. J. Ch. 199. See, for illustrations, Halsbury, *Laws of England*, vo. *Misrepresentation and Fraud*, p. 740.)

Innocent misrepresentation not a ground for an action of damages.

Innocent misrepresentation does not entitle the person deceived to sue for damages, but he is to be restored to the position which he held before the misrepresentation was made so far as regards the rights and obligations which have been created by the contract into which he has been induced to enter. Thus, a person who has been induced by such misrepresentations to enter into a partnership is entitled to be repaid the capital he has brought into the firm, and to be indemnified against all claims and demands arising under the business. (*Adam v. Newbigging*, 1888, 13 App. Ca. 308, 57 L. J. Ch. 1066. See *Redgrave v. Hurd*, 1881, 20 Ch. D. 1, 51 L. J. Ch. 113.)

Exceptions to this rule.

To the rule that an innocent misrepresentation is not a ground for an action of damages there are two exceptions, of which one rests upon the authority of decided cases and the other has been created by special legislation:

(a) The common law exception is known as the rule of warranty of authority. A person who induces another to contract with

him as the agent of a third party, whereas in fact no such agency exists, is liable for damage thereby caused even though the professed agent believed that he had authority. (*Collen v. Wright*, 1857, 8 E. & B. 647, 110 R. R. 611.)

The rule is the same when the agent originally had authority but his authority has come to an end by reason of facts of which he has not knowledge or means of knowledge, as, for instance, when the principal has become insane. (*Yonge v. Toynbee*, 1910, 1 K. B. 215, 79 L. J. K. B. 208.)

There is a similar liability when the professed agent induces a third party to take some other action instead of entering into a contract with him. (*Starkey v. Bank of England*, 1903, A. C. 114, 72 L. J. Ch. 402.) A representation of authority is a warranty. The best explanation of the rule appears to be that the professed agent makes an implied contract. (*Yonge v. Toynbee*, *ut supra*.)

Whatever the reason may be the rule is settled. A recent case is a strong illustration. One of two trustees of stock standing in their joint names in the books of the Bank of England sold it under a power of attorney, to which the signature of his co-trustee was forged. The bank allowed a stockbroker, who innocently acted under the power, to transfer the stock to other persons. The trustee whose name had been forged sued the bank for replacement of the stock and succeeded. The bank thereupon brought an action against the stockbroker to indemnify them and he was held liable on the ground that he had impliedly warranted his authority. (*Starkey v. Bank of England*, 1903, A. C. 114, 72 L. J. Ch. 402.)

The statutory exception to the rule under consideration is:

(b) The liability in damages for concealment of material facts or for untrue statements made in the prospectus of a company, even when such statements were made honestly but without reasonable grounds for belief in their truth. (*Companies Consolidation Act*, 1908 (8 Edw. 7, c. 69), s. 84. See *supra*, p. 328.)

CHAPTER XV.

DAMAGES IN CASE OF NULLITY OF CONTRACT.

A MAN who has been induced to enter into a contract which is void *ab initio*, or which is voidable, may suffer loss from having relied upon what he believed to be a valid offer.

For example, it may be that he was invited to enter into a contract which was forbidden by law and that the invalidity was known to the offeror but was unknown to the offeree.

Or it may be that the offeror's consent was vitiated by mistake and the offeree was unaware of the error. In such a case must the offeree bear the loss?

It is clear that he cannot claim damages for inexecution of the contract for the law either forbids the execution, if the contract is prohibited, or allows the other party to invoke the nullity of the contract, if the contract is voidable.

If damages cannot be claimed for breach of contract what other grounds of liability exist? Until recently the answer would have been unhesitating. The defendant, if he is to be liable at all, must have committed some fault, must have violated some duty which he owed to the plaintiff. We are out of the region of quasi-contracts or of obligations created by law. Leaving them out of account, the principle of the French law is that liability must arise either from contract or from wrong. Contractual liability is here excluded, so that we are driven upon liability for wrong—doing as the sole remaining ground upon which damages could be awarded. (See Bufnoir, *Propriété et Contrat*, p. 595; Amiens, 11 mai 1854, D. 59. 2. 147.)

When the contract is avoided on the ground of the mistake of one of the parties and the avoidance of the contract causes damage to the other party, this party may claim reparation for this damage subject to two conditions:—

(1) That he was himself in good faith, that is, he was unaware of the mistake; and (2) that the mistake of the party who claims

the nullity was a mistake due to that party's negligence. French authorities generally accept this doctrine. (Pothier, *Oblig.* n. 19; Larombière, on art. 1110, n. 12; Colmet de Santerre, 5, n. 16 *bis*, IV; Saleilles, *Théorie générale de l'Obligation*, 3rd ed. p. 165; Besançon, 18 nov. 1872, *sous* Req. 30 juill. 1872, D. 73. 1. 330; D. N. C. C. art. 1110, n. 182.)

Looking to the extreme generality of the French Code as to liability for fault this conclusion appears to be warranted. (C. C. F. 1382.)

And the terms used in the Egyptian Code are equally wide. (C. C. E. 151/212.)

Admitting that negligence implies a pre-existing duty, we must reject the argument that here no such duty exists. The relation between the parties creates a duty.

It may well be, as Hering contends, that the Roman law would not regard such a case as entitling the victim to damages under the *Lex Aquilia*.

For the Roman law had no such general rule of law as C. C. F. 1382. And there was no claim under the *Lex Aquilia* except for visible material damage to a thing or a person. (*Gesammelte Aufsätze*, 1, p. 347; *Œuvres Choiesies*, 2, p. 23; Grueber, *Lex Aquilia*, p. 209.)

Similarly, in the English law there is no general rule that a man must pay for damage caused by his fault. He is liable only if he has committed a specific civil wrong, or *tort* as it is called.

And an erroneous statement made in the honest belief that it was true is not a tort. (See Pollock, *Torts*, 10th ed. p. 577.)

But the English law does admit the existence of a duty between the parties to the voidable contract.

The English law, as is elsewhere explained, instead of making the negligent party to the voidable contract pay damages, refuses to allow him to avoid the contract. (*Supra*, p. 269.)

But this is only a different way of enforcing the duty. The law recognises that the duty exists.

The party who makes a representation meaning that another party shall act upon it cannot contest its truth in a question with the other party who has acted on the faith of the representation. The two parties are in such a relation that one of them is not allowed to cause damage to the other by avoiding the contract.

The parties are not in the position of complete strangers between whom no duty exists. In the French law, as the wide

terms of the French and Egyptian codes indicate, there is no limitative list of wrongs, and it should be possible to hold that the relation between the two parties to a void or voidable contract is close enough to throw upon each of them the duty of not injuring the other by wilful or negligent statements which induce him to enter into a contract.

This is far from saying that the offeror warrants the accuracy of the offer.

In the French law we are entitled to accept the principle that there is liability for *fault* on the part of the party who avoids the contract. And we must go a step further.

In one case there may be fault as between two parties to a contract which never came into existence.

An offeror may revoke his offer till it is accepted, unless he has granted a delay, but if he does revoke it he at least owes it to the other party to inform him at once of the revocation.

If he lets him go on and incur expense in consequence of his relying on what he believes to be a valid offer there is fault. (*Supra*, p. 188.)

May be damage without fault.

It may happen that damage is caused to a party to the contract which has been avoided though there was no personal fault on the part of the other party.

For instance, A orders by telegram 10 bouquets of flowers. By a mistake of a telegraph clerk the florist sends 100 bouquets. The message was clearly written by the sender and there is no fault on his part. Can he be made liable, and if so, upon what principle? This case has been discussed earlier and it has been submitted that A is not liable by the French law. (*Supra*, p. 265.)

But several modern codes contain rules under which A would be liable, and there are considerable authorities in favour of the other view that A is liable in the French law without any such special legislation.

The ground of liability suggested as applicable in such a case is neither breach of contract nor delictual fault, but *culpa in contrahendo*.

Culpa in contrahendo.

This doctrine has already been referred to in speaking of the effects of mistake and of the damage caused by the revocation of

an offer. (*Supra*, p. 259 and p. 188.) The general theory must now be briefly examined.

The first propounder of the theory and the inventor of the term *culpa in contrahendo* as a new category was Rudolf von Ihering, and his essay upon the subject remains the *locus classicus*. (*Gesammelte Aufsätze*, 1, p. 327, in French translation, *Œuvres Choiesies*, 2, p. 1.)

Shortly stated, Ihering's theory is that, in addition to the fault in the legal sense of that term which consists in the breach of a contract, and to the fault which consists in a wrong, there is a third kind of fault, viz., fault committed in the formation of a contract.

The party who makes to another an offer to contract thereby binds himself to make good all loss caused to the other by his relying in good faith upon this offer being an offer to make a valid contract, and he also binds himself to make good all loss caused to the other by his relying in good faith upon the offer being correctly communicated by a messenger employed by the offeror.

If it turns out that the contract was void or voidable, or that the message was incorrectly transmitted, the measure of the loss, in either case, is the prejudice caused to the offeree by his misplaced reliance.

This loss is not necessarily, nor even usually, equivalent to the loss he would have incurred by the inexecution of a valid contract.

This last point—the theory of *intérêt négatif*—has been explained in speaking of Mistake in the German Law, seeing that Ihering's theory upon this subject has been adopted by the German Code. (*Supra*, p. 287.)

Ihering explains that he was led to make the inquiry by what appeared to him to be the inequitable character of the law as usually understood. He gives two examples of this supposed hardship:—

(a) A man wants to order 100 pounds of a commodity, and, by a slip of the pen, orders 500 pounds.

The goods are sent and he refuses to take them.

(b) I ask a friend to order for me 1/4 box of cigars and he orders for me 4 boxes.

Assuming, in both cases, that the contract is voidable, is it not contrary to justice that the merchant who sends the goods should have to pay the costs of carriage, etc.? (*Gesammelte Aufsätze*, 1, p. 328 and p. 330; in French translation, *Œuvres Choiesies*, 2, p. 3 and p. 6.)

Must there not be an implied warranty on the part of the orderer of the goods to indemnify for loss so caused?

Ihering contends that there are texts of the Roman law which sufficiently support the theory that such a warranty exists.

The most pertinent are certain texts relating to the sale of a thing which was not an object of commerce, such as the sale of a freeman, or of a *locus religiosus*.

In such a sale the purchaser in good faith had an action against the seller for the damage caused to him by the nullity of the sale.

The texts are contradictory upon the point, so important for Ihering's theory—whether the purchaser had this claim when the seller was ignorant of the impossibility, that is when there was no *dolus* or *culpa* on his side. (Inst. 3. 23. 5; Dig. 11. 7. 8. 1; Dig. 18. 4. 8; 9; Girard, *Manuel*, 5th ed. p. 445; Windscheid, *Pandekten*, 8th ed. 2, s. 315, note 5; Broek, W., *Negative Vertragsinteresse*, p. 38; Savigny, *Oblig.* 2, s. 81.)

The correct interpretation of the Roman texts upon this matter is very controversial.

But it is certain that the Roman jurists did not formulate any general theory such as that propounded by Ihering and did not expressly admit any third category of fault, viz., *culpa in contrahendo*, though it may be argued that they recognised it by implication.

The French Code has retained one of the rules of the Roman law of sale which has a bearing upon this question.

La vente de la chose d'autrui est nulle: elle peut donner lieu à des dommages-intérêts lorsque l'acheteur a ignoré que la chose fût à autrui. (C. C. F. 1599.)

Some writers say this is a recognition by the French Code of *culpa in contrahendo*. For the liability exists although the vendor had good reasons for thinking that the thing belonged to him. (B.-L. et Saignat, *Vente*, n. 119; Aubry et Rau, 5th ed. 5, p. 48; Bruxelles, 8 janv. 1891, D. 91. 2. 358.)

The French commentators have found the article difficult to explain, and the Egyptian Code has not retained in this case the liability without fault. The purchaser's claim is only when the vendor *knew* he was selling what did not belong to him. (C. C. E. 265/334.)

But admitting that the French Code creates here a liability without fault, the fact that the code provides in this case for damages is an argument *e contrario* of some weight against

damages being payable in other cases of nullity as to which the code has no similar provision.

If there is a text creating a legal warranty we have only to apply it. But it is a very different thing to assume with Ihering that such a warranty exists without any text.

If the civil law admits *culpa in contrahendo* as a special category of fault and allows damages in an important class of cases, without requiring negligence, it is, to say the least, surprising that this should have escaped the notice of all the old writers and should be first discovered in 1860.

The typical case of the mistake made by a messenger is discussed elsewhere. (*Supra*, p. 259.) For the reasons there stated it is submitted that the theory of *culpa in contrahendo*, whatever may be said in its favour from a legislative standpoint, does not form part of the actual French law. (See, however, B.-L. et Barde, 1, n. 362, *sub fin.*; Saleilles, *Théorie Générale de l'Obligation*, 3rd ed. p. 177.)

Comparison with other laws.

The German Code adopts to a great extent the theory of Ihering.

The party who has promised a prestation which is impossible or illegal must pay damages—the “negative interest”—if he knew or ought to have known of the impossibility, and if the other party did not know it and his ignorance was not culpable (art. 307).

The applications of the theory in the case of mistake are dealt with elsewhere. (*Supra*, p. 259.)

English law.

The English law knows nothing of *culpa in contrahendo*.

CHAPTER XVI.

PERSONS.

THE parties to an obligation must be entities capable of holding and of exercising rights either by themselves or by those who are legally entitled to represent them.

The subjects of rights, or, as they are technically styled, "persons," are thus classified:—

(1) Natural persons.

(2) Moral persons.

Moral persons, again, are subdivided into: (1) Moral persons of the private law, and (2) moral persons of the public law.

The powers of natural persons to exercise rights depend in Egypt upon the law of the personal status, and its explanation lies outside the scope of this work. The rules which apply to the responsibility of natural persons for wrongs belong to the law of responsibility.

Moral persons of the private law are in Egypt: Partnerships, whether commercial or civil, and companies, or *sociétés anonymes*.

According to the settled jurisprudence in Egypt, civil partnerships enjoy personality without the necessity of compliance with the formalities of inscription or publicity. It suffices that there is a *fonds social* distinct from the personal estates of the partners. Where this partnership-capital exists, the partnership is *ipso facto* a moral person. (C. A. Alex. 8 févr. 1899, B. L. J. XI, 122; C. A. Alex. 21 déc. 1892, B. L. J. V, 85.)

A fortiori, a commercial partnership is a moral person. (C. A. Alex. 8 févr. 1899, *ut supra*; C. A. Alex. 6 févr. 1890, B. L. J. II, 362.)

In the French law commercial partnerships are incontestably moral persons. As to the personality of civil partnerships there has been much controversy. Many writers still maintain the traditional view that civil partnerships are not moral persons. (Lyon-Caen et Renault, *Traité de Droit Commercial*, 4th ed. 2,

n. 127.) But most writers admit that a partnership of which the object is civil has, nevertheless, a moral personality if it is constituted in the commercial form. (See Arthuys, *Traité des Sociétés Commerciales*, 2nd ed. n. 107, and n. 836; and authorities in D. N. C. C. art. 1832, n. 142 and n. 151.) The jurisprudence now holds that civil partnerships without distinction are moral persons. (Req. 22 févr. 1898, D. 99, 1. 593; D. N. C. C. art. 1832, n. 152. See, in this sense, Thaller, *Traité Elém. de Droit Commercial*, 4th ed. n. 297.)

The capacity of moral persons is, like that of physical persons, governed by the law of their personal status. Accordingly it has been held that when a company is registered in England, and has its principal seat of business there, it is an English company, and if, by the English law, the liability of its shareholders is limited to the amount of their shares, this limitation of liability will avail them in Egypt. (C. A. Alex. 15 janv. 1913, B. L. J. XXV. 131. As to the domicile of a company by the English law, see *Mitchell v. Egyptian Hotels, Limited*, 1915, A. C. 1022, 84 L. J. K. B. 1772; *The Polzeath*, 1916, P. 241, 85 L. J. P. 241; article by E. J. Schuster in Proceedings of "The Grotius Society," 2, p. 57.)

For the French law as to nationality of companies, see Valéry, *Manuel de Droit International Privé*, n. 895; Weiss, A., *Traité de Droit International Privé*, 2nd ed. 2, p. 477; Lyon-Caen et Renault, *Traité de Droit Commercial*, 4th ed. 2, n. 1162. For the nationality of a company in questions as to trading with an enemy, see Req. 20 juill. 1915, D. 1916, 1. 144; and *supra*, p. 127.

Associations.

Does an association of persons enjoy juristic personality if it is formed not for the purpose of carrying on business and realising a profit from the employment of the capital, but is created for the protection of the common interests of the members, or for charitable or other non-commercial purposes? This is a very controversial question. In one case, the Tribunal of Alexandria held that a mutual association of the employees of the Municipality of Alexandria might be sued as a partnership, but that no action would lie against the president, seeing that the statutes of the association provided that the *Conseil d'Administration* represented the association in legal matters. It was held that the courts are entitled to declare the juristic personality of an association founded

for the mutual benefit of its members, although not directly authorised by the Government. Such an association is to be treated as a partnership, although its object is not the material but the moral profit of its members. (Trib. Alex. App. 9 sept. 1913, O. B. XV, n. 13.) And, in another case, where an action was brought against the Egyptian University for an alleged unreasonable exercise of its powers of discipline, the members of the Council were summoned by name, and a judgment was given against the University, although it had received no official authorisation.

The only recognition by the Government consisted in an unofficial letter of 16 June, 1908, by the President of the Council of Ministers in which the phrase was used, *Tout en approuvant cette grande œuvre d'utilité publique*, etc. This letter was in reply to a request for the recognition of the University as a work of public utility. The President of the Council of Ministers wrote acknowledging the receipt of the statutes and wishing success to the University. (C. A. 16 April, 1914, O. B. XVI, n. 14.)

On the other hand, the Tribunal of Assiut, in an earlier case, had held that a charitable society was not a moral person. (Trib. Assiut, 14 October, 1901, O. B. IV, n. 7.)

The Mixed Court of Appeal has held that a society of authors, composers, and publishers of music was not a moral person. The dues paid to the society by its members did not constitute a *fonds social*, because they did not form a capital which was to be employed in order to make a profit. In the view of the Mixed Court of Appeal the members of such an association are merely individuals who have given a mandate to a syndicate to defend their rights, and, for this purpose, to collect certain funds. There is no moral personality in such an association, and the agent-general of the association cannot sue in his own name on behalf of the members. (C. A. Alex. 30 mai 1903, B. L. J. XV, 324.)

To recognise the personality of associations in the absence of any text in the law authorising the courts to do so, appears to be a very strong exercise of judicial legislation. In France it has been necessary to regulate the matter by legislation, *loi du 1er août 1901*.

The French and German laws now agree in declining to recognise an association as possessing personality until it has made in a prescribed manner a declaration of its existence. (*Loi du 1er août 1901*, art. 2; German Code, art. 21. See Ducrocq,

Droit Administratif, 7th ed. v. 6, n. 2194, and the note to Dall. 99. 2. 401.)

The new Swiss Code goes further, as under its provisions associations acquire personality *dès qu'elles expriment dans leurs statuts la volonté d'être organisées corporativement* (art. 60).

It is difficult to see how in Egypt the same result can legally be reached in the absence of any such provision in the code.

Juridical persons of the public law in Egypt.

In Egypt the number of juridical persons of the public law is very restricted. The State has always been recognised as a juridical person. The administrations of the State are not so regarded. By the codes of civil and commercial procedure, it is provided that, in order to effect service, the copies shall be delivered to the directors of the *Divans* of such administrations. (C. C. P. E. 8/10.)

But this is merely for convenience, and it does not imply that the administration is a juridical person distinct from the State of which it forms a branch.

Under the Organic Law of 1st July, 1913, art. 44, n. 2, the provincial councils are to be considered as moral persons represented by the mudir. By the *Décret Organique du 5 janv. 1890*, art. 13, instituting a municipal commission at Alexandria, it is declared that *la Commission Municipale d'Alexandrie constitue une personnalité civile de nationalité indigène*.

With regard to the other municipal commissions, there has been much controversy. By the last judgment upon the subject, the Tribunal of Tantah on Appeal held that "the Mixed Municipal Commission of Tantah is a public administration and forms part of the Government. The provisions of its organic law show that the transformation of this body from a local commission into a mixed municipal commission did not change its nature. The provision contained in arts. 16 and 17 of that law, to the effect that the municipal commission exercises its functions and contracts its loans, "without any responsibility or guarantee on the part of the Government, simply means that expenditure made by the commission must be paid out of the municipal funds, as distinguished from the State Treasury." (Trib. Tantah, 25 April 1916, O. B. XVII, n. 43.)

On the other hand, the Tribunal of Zagázig held, in an earlier case, that the Mixed Local Commission of Zagázig, as constituted

by law No. 23 of 1905, does not form part of the Government, but is a separate juristic person. (Trib. Zagazig, 9 September 1911, O. B. XIII, n. 37.)

The practical interest of deciding these questions in the cases which have hitherto arisen has been to determine the competence of the court or the legality of a *saisie-administrative*. If the municipal commission is merely a branch of the central government, it will follow that, according to the *Décret* of 18 mai 1892, art. 1, actions against it by natives would be competent only in the Tribunals of Cairo, Alexandria, Mansourah, Assiut, and Kena.

In the recent case regarding the Municipal Commission of Tantah, the judge of the Summary Court held that a *saisie-administrative* executed by the Commission to recover taxes, was null upon the ground that the Municipal Commission was not a branch of the Government. This decision was reversed by the judgment of the tribunal cited above.

The theory that such a municipal commission is merely *un rouage du gouvernement* was supported by M. Piola-Caselli in his remarkable *Mémoire*, and there does not seem to be any reason to doubt that municipal commissions are part of the public administration.

Their functions are entirely of a public nature, such as administration of roads, water, lighting, public health and so forth. Certain high officials are *ex officio* members of the commissions. Further, the State exercises a large control over the commissions, and their resolutions are executory only when approved by the central administration.

But though it is clear that the Commissions are part of the Government, it is not equally clear that they should not be regarded as public persons distinct from the personality of the State. Upon the theory that they are merely branches of the general system of administration, it is not easy to explain the clause *La Commission exerce ses attributions à ses risques et périls en dehors de tout engagement ou garantie de la part du gouvernement*. If they are more correctly to be regarded as distinct juridical persons, they are undoubtedly juridical persons of the public law, and as such entitled to employ the right of *saisie-administrative*. Article 15 of the *Décret de Réorganisation des Tribunaux Indigènes*, corresponding to article 11 of the *Règlement d'Organisation des Tribunaux Mixtes*, which provides that the juridical authority cannot suspend or stop the execution of an administrative measure, is in no way limited to administra-

tive measures of the central Government. It is equally applicable, for the same reasons, to administrative measures by local authorities. The fact that such a local authority has a distinct personality does not affect the question in any way. Whether it has such a personality or not, it is, by its nature, a public authority exercising public functions: it is, in short, a part of the government of the country.

The history of the Ministry of Wakfs differs from that of the other administrations of the State, and there would seem to be much force in the argument that this Ministry is not a branch of the public service in the same sense as the other ministries. It exists to administer funds derived from private sources, and, in large measure, set apart for religious purposes. (Aga, 13 Dec. 1915, Al Hocone, 1916, p. 51, n. 30, confirmed, Trib. Mansourah, 5 mars 1916. O. B. XVIII, n. 36.) And there seems to be much to be said for the view that it is not a mere department.

The *décret du 20 nov.* 1913, which created the Ministry in place of the former *Administration Générale des Wakfs*, says that the new Ministry *conservera son autonomie propre et son budget indépendant*—language which goes far to show that the Ministry is to be a juridical person. The true legal character of this Ministry deserves careful study in the light of the previous history and of the legal position of the ruler of the State in regard to the Wakfs, but this matter belongs to administrative law.

CHAPTER XVII.

LEGAL CAPACITY OF PERSONS TO CONTRACT.

THE capacity of persons to contract is dealt with by the codes in a very meagre and unsatisfactory way, and the term capacity is used even by lawyers in a variety of senses.

We must distinguish between (1) natural incapacity, and (2) legal incapacity; and legal incapacity may itself be either (a) incapacity to own, or (b) incapacity to exercise rights. Further, the incapacity may be (c) absolute, that is, an incapacity to make any contract at all, subject to certain exceptions made by the law; or (d) relative, that is an incapacity to make certain particular contracts. (B.-L. et Barde, 1, n. 229; Planiol, 6th ed. 2, n. 1079; Capitant, *Introduction*, 3rd ed. p. 143.)

The Egyptian Code calls this last "incapacity relative to certain acts." (C. C. E. 129/189.) Legal incapacity is in Egypt governed by the personal law, whether the capacity is absolute or relative. The question whether a minor, or a married woman or an interdicted person, has or has not the capacity to make a certain contract is resolved by application of the personal law. (C. C. E. 130, 190; C. A. Alex. 22 févr. 1912, B. L. J. XXIV, 164.)

But, according to the jurisprudence, this principle does not apply to an incapacity which does not result from the general law regulating certain classes of persons such as minors, but is an exceptional incapacity created as to the particular person, such as results, for instance, from a judgment declaring a person insolvent, or giving to him a judicial adviser—*conseil judiciaire*. (C. A. Alex. 6 janv. 1908, B. L. J. XX, 49.)

Nor does the rule apply where the person who founds upon his incapacity has induced the other to contract by using fraudulent devices which have led the other to believe that he had full capacity. (Aubry et Rau, 5th ed. 4, p. 425; Laurent, 18, n. 547; C. A. Alex. 22 févr. 1912, B. L. J. XXIV, 164.)

Neither the French Code nor the Egyptian, in dealing with

the capacity to contract, makes any reference to natural incapacity. (B.-L. et Barde, 1. n. 228; Capitant, *Introduction*, 3rd ed. p. 145.)

The code thinks it unnecessary to state that there can be no contract unless both parties possess natural capacity. This is, as the Court of Appeal of the Mixed Courts expresses it, "a primordial condition." (See C. A. Alex. 6 avril 1899. B. L. J. XI. 176.) What is meant by natural incapacity must be explained.

Natural incapacity.

It is of the essence of contract that there shall be two parties. Contract involves the meeting of two minds. A lunatic or an imbecile or a baby has no mind with which to give consent. And, though there may be an appearance of a contract between such a person and a capable party, there is in truth no contract because there are not two parties. The code does not find it necessary to say anything about this because it is implied in the very nature of contract.

The person subject to a natural incapacity being unable to give any consent, a contract between him and another can never come into existence.

Or, perhaps, a more correct way of stating the case is that the lunatic or the imbecile, or the baby cannot be a party to a contract at all. (See Toulouse, 21 janv. 1885, D. 86. 2. 73; and *dissertation* by M. Glasson; Nîmes, 29 janv. 1890, D. 91. 2. 97, note 1-4; Hue, 7, n. 57; Demolombe, 24, n. 81.)

The same principle applies to those groups of interests or masses of property which enjoy no personality, as opposed to those to which the law gives a status, and which are commonly called moral persons or juristic persons.

Whatever theory we adopt with regard to the legal character of the ownership in this case is immaterial as regards this point. According to the traditional theory, such bodies, for example, as the State, or as a limited company, or as a commercial partnership, and even, according to the recent French and Egyptian jurisprudence, as a civil partnership, are fictitious persons. (For a full list, see Cass. 23 févr. 1891, D. 91. 1. 337; B.-L. et Barde, 1, n. 237; Aubry et Rau, 5th ed. 1, p. 268. For references upon the dispute among the authors as to the personality of civil partnerships, see D. N. C. C. art. 1832, nos. 136 *seq.*; Michoud, *Théorie de la Personnalité Morale*, 1, p. 153.

As to commercial partnerships, Thaller, *Traité Elém. de Droit Commercial*, 4th ed. p. 168; and, for Egyptian jurisprudence, p. 341, *supra*.)

These moral persons can bring and defend actions in their own name, can litigate, even with their own members, and their property belongs not to the members but to the fictitious person, and so on. According to many modern authorities, this is an unscientific view of the matter, and it was unnecessary to invent the theory of fictitious or juristic personality.

It is maintained that the property belongs to the members of these groups, but is held by them collectively, and has to be administered by the appropriate machinery. Planiol, among other recent writers, adopts this view, and, therefore, quite logically, he places the law dealing with these groups of interests under the law of property and not under the law of persons. Instead of individual ownership we have here, upon this theory, collective ownership, but the owners must always be natural persons, though the ownership is exercised in a special manner. (I, n. 3005. See Saleilles, R., *De la personnalité juridique*, Paris, 1910; Demogue, R., *Notions Fondamentales du Droit Privé*, p. 352.)

But, whether we adopt the new theory or not, the practical result is the same. The group of interests to which the law has given a status—the juristic person, if we retain the old terminology, can make a contract through those natural persons who by law are entitled to represent it.

But a group of interests or collection of individuals to which no legal status has been given cannot sue or make a contract. For example, a football-club or a literary-society, unless corporate existence has been given to it by the law, has no legal status. Such a group has no existence visible to the eyes of the law, and if its officers make a contract, the question how far the members are liable under the contract, or whether they are liable at all, is simply a question of agency, and depends upon the answer to the question what authority did they give to these officers to pledge their credit. (See Aubry et Rau, 5th ed. 1, p. 278; Huc, 7, n. 57; Cass. 2 janv. 1894, D. 94, 1. 81; C. A. Alex. 30 mai 1903, B. L. J. XV, 324.)

If a contract purports to be made on behalf of such a group, there is in reality no contract because there are not two parties.

Under a recent French law such a body may easily acquire a status as an association. *Loi du 1er juill. 1901*, art. 5. See

Planiol, 2, n. 2015; D. N. C. C. art. 1832, nos. 106 *seq.*, and *ib.* IV, p. 652, n. 48.)

Status for certain purposes only.

But, further, in regard to groups, such as limited-liability companies—*sociétés anonymes*—although a legal status is given to them it is a status for certain purposes only. A natural person, if possessed of full capacity, can do anything, and can make any contract which is not specially prohibited by law. But a company, or any other juristic person, exists only for certain definite purposes, and enjoys the protection of the status given to it by the law, only so long as it acts within the limits prescribed for it.

Laurent proposed an amendment of C. C. F. 533 in a draft revision of the Civil Code in these terms: *Les corporations n'ont d'autres droits que ceux qui leur sont conférés par l'acte d'incorporation. En dehors de leur destination légale, elles n'ont pas d'existence aux yeux de la loi.* (*Principes*, I, nos. 299 *seq.*, 11, n. 197. Cf. Dueroeq, *Droit Administratif*, 7th ed. 6, n. 2226.)

Some French writers deny that the moral person has only a restricted capacity, and prefer to say that it has, in principle, a general capacity though it can use its funds only for the purposes of carrying out the objects for which it exists. (Michoud, *De la Personnalité Morale*, 2, pp. 112 *seq.* and pp. 142 *seq.*)

This is commonly called the theory of *spécialité*. As M. Capitant expresses it: *Chaque personne morale est spécialisée, en vue d'un but à atteindre; c'est par exemple, un hôpital, un bureau de bienfaisance, une société de secours mutuels, un mont-de-piété, une caisse d'épargne. Son champ d'activité est donc à l'avance délimité par ses statuts ou par la nature de sa fonction. Tous les actes qu'elle fait doivent tendre à la réalisation de son objet. Elle ne peut donc pas sortir de ce cadre dans lequel elle est placée; elle ne peut pas employer sa capacité à faire autre chose, à poursuivre d'autre but que le sien propre.* (Introduction, 3rd ed. p. 204. See Michoud, *l.c.*; Cass. 19 juin 1908, S. 1910. I. 57, D. 09. I. 21. Cf. Civ., 18 oct. 1910, D. 1912. I. 233, and the note by M. Appleton.)

From the practical point of view it makes no difference which of these explanations we adopt, but the former appears to be the better of the two.

Analogous rule in English law.

In the English law there has been a similar difference of opinion as to the true theory. Some authorities have held that acts done in excess of the powers given expressly or by implication to the moral person, acts *ultra vires*, to use the consecrated term of the English law, are simply not the acts of the corporation at all. As corporate acts they are inexistent.

The corporation has not the capacity to make them.

It is a case of incapacity to contract rather than of illegality, and the corporation is, as it were, non-existent for the purpose of such contracts. (See per Lord Cairns in *Riche v. Ashbury Carriage Company*, 1874, L. R. 7 H. L. at p. 672; 44 L. J. Ex. 185, 197.)

This view is now more generally accepted. (Pollock, *Contracts*, 8th ed. p. 133; Anson, *Contracts*, 14th ed. p. 150.)

The other and less sound view is that the corporation having general capacity can do any acts, except such as are impossible owing to its immaterial nature, and, therefore, the acts which are *ultra vires* are the acts of the moral person.

If the law treats them as void it is because they are prohibited acts and not because of a defect of capacity.

(See for discussion, Pollock, l.c.; Salmond, *Jurisprudence*, 5th ed. p. 290; Terry, *Principles of Anglo-American Law*, s. 118; Holland, *Jurisprudence*, 9th ed. p. 321.)

Illustrations of incapacity of moral persons.

A company which has been created for the purpose of constructing and operating a railway has a legal status for these purposes only, though this no doubt involves the power to do various things which are ancillary to the carrying on of the undertaking. But such a company could not, for instance, work a gold mine, unless special powers to do so had been given to it. When a juristic person enters into a contract which is incompatible with the end for which it was created, to use the terminology of French writers, or, as English lawyers express it, when the act is *ultra vires*, the contract which it makes is null for want of capacity to make it. We may say in this case also that there is no contract because there are not two persons present. It is true that there is a group which is visible in the eyes of the law but it is not visible for this particular contract. The in-

capacity of the juristic person to act outside its scope may be assimilated to the natural incapacity of certain human beings.

Different where act is compatible with the object for which the moral person exists but needs special authority.

It is different when the contract is within the objects for which the juristic person was created, but is one for which some special authorisation is prescribed by law. For instance, a municipal corporation or other public body may be allowed to make certain contracts, but only subject to their approval by a government department.

In such a case the corporation may be said to be in a similar position to that of a minor whose act is valid if approved of by his tutor. (See B.-L. et Barde, 1, n. 237, and authorities in D. N. C. C. art. 1124, n. 143; Cass. 18 oct. 1910, D. 1912. 1. 233.)

Legal incapacity.

This may be incapacity to own—*incapacité de jouissance*—where there is a provision of law for prohibiting a person from owning property. Thus in the old French law a person who was civilly dead, for example, a monk or a nun who had taken perpetual vows, was in this position. (Viollet, *Histoire du Droit Civil Français*, 2nd ed. p. 284; Brissaud, *History of French Private Law*, in *Continental Legal History Series*, p. 880; Aubry et Rau, 5th ed. 1, p. 529.)

There is no longer any case in the French or in the Egyptian law in which a natural person is under an absolute incapacity of this kind. But there are various cases of relative incapacity. As examples may be given that of the tutor who cannot buy the property of the ward, and that of the judge who cannot buy a litigious right in the jurisdiction where he exercises his functions. (C. C. E. 258, 257-325, 324; C. C. F. 1597, 1596.)

But the most important cases of legal incapacity are cases not of incapacity to own rights but of incapacity to exercise rights. The minor or the interdicted person, or the person condemned to hard labour or detention are not incapable of owning property, but their right to dispose of it is restricted. (C. Pén. E. 25, 39.)

The restriction is intended for their benefit, or at least this is so except in the case of the prisoner, where the restriction is a forfeiture of rights which forms a part of the punishment. Seeing that the incapacity is for the protection of the person who is

declared to be subject thereto, it follows that a contract into which he has entered cannot be attacked upon this ground by the capable person with whom he contracted.

The nullity is only relative. Upon this principle it is probably correct to say that a contract made with a prisoner contrary to his powers under the Penal Code can be attacked by either party because the restriction of his capacity is not meant as a protection for him. (See Beudant, *Personnes*, 2, p. 516.)

This at any rate is the view taken by many writers on the French law. (Planiol, 1, n. 1630; *D. Rép. Oblig.* n. 383.) In the Egyptian law it is rather more difficult to reach this result. C. C. F. 1125 says that persons capable of binding themselves cannot plead the incapacity of the minor, the interdicted person, or the married woman with whom they have contracted, whereas C. C. E. 132/192 is quite general in saying that capable persons cannot plead the nullity of the incapable persons with whom they have contracted.

But, probably, the courts would interpret this article as applying only to the cases where the incapacity is a privilege and not a punishment.

In the French law the minor cannot get the contract set aside without proof of lesion, though the interdicted person, or the married woman does not need to prove lesion in order to have the contract annulled. (C. C. F. 502, 1305.)

* The Egyptian Code does not require proof of lesion.

The reason for this difference no doubt is that by the Mohammedan law acts performed by minors without the assistance of their tutors are divided into three classes, (a) injurious, (b) merely profitable, and (c) neutral. The first are absolutely null, and cannot be ratified by the tutor, the second are valid without any ratification, and the third are valid if ratified by the tutor. (*Statut Personnel*, arts. 484—5.) The "neutral" class includes the important synallagmatic contracts. So, as to sale it is said, "the execution of selling and buying, which can either be profitable or not, depends on the approval of the guardian till the boy is quite adult," that is to say, 18 years of age. (Ibn Abidin. Interpretation of *Eddor Elmokhtar*, Part V.)

Can a relative incapacity be pleaded by a third party?

This question is not answered by the codes. All that they say is that the capable party to the contract cannot set up the incapacity of the other. (C. C. E. 132/192; C. C. F. 1125.)

And the *Cour de Cassation* has held that this provision has no application to third parties. *Cette disposition ne concerne que les rapports entre les parties contractantes.*

In the case under consideration a moral person of the public law, namely a *société départementale des pompes funèbres*, had assigned its monopoly to another company. The assignation required for its validity the approval of the government, and this had not been given.

The assignee claimed damages from a third party on the ground that this third party had conducted funerals to the prejudice of the monopoly given to the plaintiff.

The defendant pleaded that the assignor was not capable of making the assignment without the approval of the government and the action was dismissed on this ground. (Cass. 18 oct. 1910, D. 1912. 1. 233.)

The *arrêliste* justly says, *Lorsqu'une personne se présente en justice pour réclamer contre un tiers l'exercice d'un droit prétendu, l'une des conditions d'exercice de son action en justice consiste à avoir qualité pour agir. S'il présente un titre imparfait, vicié soit par son incapacité personnelle, soit par celle de son auteur, il n'a pas qualité pour agir, et verra son action déclarée irrecevable, sans même qu'elle puisse être examinée au fond, parce qu'il n'a pu justifier de sa qualité. Lorsque le débat où le sort d'un acte passé par un incapable se trouve intéressé ne met pas en présence les deux contractants, mais l'un d'eux et des tiers, ce n'est plus une question de capacité qui s'agite, mais une question de qualité pour agir. Dès lors, l'art. 1125 est inapplicable.*

Return by the incapable person of benefits.

These legal incapacities, or restrictions of capacity, being created for the protection of the person whose freedom to contract is limited, are not to be taken advantage of by him in order to defraud others. The incapable person to whom money or money's worth has been paid under a contract cannot get the contract set aside on the ground of his incapacity, and thereby relieve himself from the necessity of performing what he has promised, while at the same time, he retains the benefits which he has received, for this would be a case of unjust enrichment. (C. C. E. 131/191; C. C. F. 1312.)

The money or money's worth which has come into his pocket has come there without a cause and must be returned if it is still

there. This is a general principle which applies to all incapable persons, and it applies also to moral persons when the question is whether they must account for benefits which they have received under a contract which it was outside their power to make.

The moral person cannot plead that the contract was *ultra vires* and retain, at the same time, the benefit which it has got under the contract. (Req. 19 déc. 1877, D. 78. 1. 204. Cf. Cass. 23 févr. 1891, D. 92. 1. 29.)

The Egyptian codes state the rule thus:—

Persons without capacity, who have procured the avoidance of an obligation on the ground of their incapacity, shall be liable to account for such profits only as they have derived from performance by the contracting party having capacity. (C. C. E. 131/191.)

The French Code says that the restitution by the incapable party *ne peut être exigé à moins qu'il ne soit prouvé que ce qui a été payé a tourné à leur profit.* (C. C. F. 1312. See also C. C. F. 1241.)

The case is an application of the general rule which does not allow an unjust enrichment, a rule which will require fuller consideration in speaking of quasi-contracts.

The minor or other incapable person is not to be allowed to enrich himself unjustly any more than a capable person.

But in deciding whether there has been an enrichment, there is an important distinction between incapable persons and capable persons. When a payment is made to a capable person he is always enriched.

The money is always *in rem versum*, to use the classical phrase. For example, a borrower possessing full capacity cannot plead that he did not benefit by the loan.

If he got the money he derived a profit, although he may have thrown the money into the Nile the moment afterwards.

But when the payment is made to a creditor who is by law incapable of receiving it the presumption is that it did not "turn to his profit." The *onus* lies on the other party to displace this presumption. (Larombière on art. 1312, n. 6; Demolombe, 29, n. 174; Cass. 1er juin 1870, D. 70. 1. 432; Req. 7 juillet 1879, D. 1880. 1. 61.)

The incapable person is not necessarily the richer by the mere fact of having received the payment. For he may have squandered it in folly. And it is precisely because his incapacity makes such folly probable that he is protected by the law.

In deciding whether what he has received has turned to his profit we must examine what he did with it. There is no difficulty in deciding that if he has anything in his hands as the outcome of the contract he must return this. If he has borrowed money and has spent half of it foolishly, but has still got the other half in the bank, he must restore what he has as a condition of his relief. If he paid with the borrowed money a debt which he was legally bound to pay this has turned to his profit. (Cass. 23 févr. 1891, D. 92. 1. 29; Paris, 20 janv. 1904, D. 1906. 2. 25.) And if he has bought something with the money he must return this article, whether it be of much utility to the other party or not. Further, if the incapable person has bought necessities with the money, or has spent it in necessary repairs to immovables, it is clear also that the money has turned to his profit. This will be so even if the subsequent profit has been lost by a fortuitous event.

Suppose the incapable person had made necessary repairs to a house, and a week afterwards the house was accidentally burnt down, when he brings an action for relief from the contract, the other party can plead that what was spent for the repair of the house turned to the profit of the incapable. (Pothier, *Oblig.* n. 504; Hue, 8, n. 26.)

But let us suppose that the incapable person has made a use of the money, or whatever else he got under the contract, which was not necessary, though it was reasonable and beneficial to him at the time, and that, owing to some accident, this profit is no longer subsisting at the date of the action. Perhaps he bought a horse with the money, and, in his circumstances, this was at the time a reasonable purchase, but afterwards the horse was killed by a fortuitous event. When the incapable person brings his action, can the other party successfully maintain that the money turned to his profit? Upon this question there is a conflict of French authority.

Pothier says the loss must be borne by the capable party.

The incapable person is not bound to reimburse any profit which does not remain in his hands at the date of the action unless it was spent in necessities. (*Oblig.* n. 504. Cf. Larombière, *Oblig.* art. 1312, n. 8.)

But most of the recent writers are on the other side. (B.-L. et Barde, 2, n. 1434, 3, n. 1971; Aubry et Rau, 5th ed. 4, p. 256, note 18.)

The second view is more equitable, and there is nothing in the

text of the codes to exclude it. The articles do not say that the profit must be still subsisting.

It must be carefully borne in mind that the rule under discussion applies only to cases of contract and not to cases when the liability of the incapable person arises from other sources of obligation, as, for example, when something has been done for his benefit without any contract at all, or when his liability is for a wrong which he has done.

CHAPTER XVIII.

INTERPRETATION OF CONTRACTS.

UNDER this heading the French Code and the Code of Quebec give nine rules which are intended to assist the courts in cases where the meaning of a contract is disputed. (C. C. F. 1156—1164; C. C. Q. 1013—1021.) In the Egyptian Code these rules are reduced to three, but it is quite certain that there is no intention to alter the law. (C. C. N. 138—140; C. C. M. 199—201.) Some modern codes find it unnecessary to give any rules of interpretation but one, viz., that in interpreting a contract the court is bound to give effect to the real intention of the parties. So the German Code says: *Contracts are to be interpreted in the manner in which the good faith and mutual confidence of the parties require, taken in connection with the usages admitted in such affairs* (art. 157. Cf. art. 133). And the Swiss Code of Obligations says: *In order to appreciate the form and the clauses of a contract it is necessary to search for the real and common intention of the parties and not to adhere literally to the inexact expressions or terms of which the parties may have made use either in error or in order to disguise the true nature of the agreement* (art. 18).

All contracts require good faith.

The French law, as elsewhere stated, does not distinguish, as the Roman law did, between contracts *stricti juris* and contracts *bonæ fidei*. In all contracts the parties are bound to show good faith. (*Infra*, p. 380, and *infra*, 2, p. 3.) *Les conventions légalement formées . . . doivent être exécutées de bonne foi.* (C. C. F. 1134.) Neither of the parties is allowed to neglect the interest of the other. So if a seller voluntarily delays to call upon the buyer to take delivery of the thing sold, and this causes damage, he is violating this elementary principle. *Il est con-*

traire à la bonne foi qui doit présider à l'exercice des droits de permettre à un créancier d'aggraver la condition de son débiteur en temporisant avant d'exiger l'exécution du contrat. (C. A. Alex. 11 avr. 1917, B. L. J. XXIX, 360.)

It is an implied term of all contracts that neither party will do anything which will prevent him from fulfilling his own obligation, or which will prevent the other party from performing his part of the contract. As an illustration of this principle, when, under the contract, one of the parties has obtained confidential information as to the business of the other, it is a breach of contract for him to make use of this information for his own purposes and against the interest of the other party. In one case a contract was made between a manufacturer and a merchant under which the merchant was to sell the manufacturer's goods. Under this contract the merchant was initiated into all the business relations of the manufacturer and brought into connection with all his customers. Instead of encouraging them to buy the goods of the manufacturer he recommended them to buy a similar article made by another. This was held to be a breach of the implied contract—*contraire aux obligations implicites que la bonne foi et l'équité faisaient dériver de la convention intervenue*. (Cass. 2 janv. 1901, D. 1901. 1. 24.) In a Quebec case where a manufacturing chemist undertook to make pills for a druggist from a prescription supplied by the latter, this was held to imply that he would not make the same pills for other parties, using as samples the pills made for the plaintiff. (*Wampole v. Simard*, 1905, 29 Canadian Supreme Court Reports, 160, R. J. Q. 28 S. C. 122.)

Same rule in English law.

The English law admits the same principle. "It is, I think, clearly established as a general proposition that where two persons have entered into a contract, the performance of which on one or both sides is to extend over a period of time, each contracting party is bound to abstain from doing anything which will prevent him from fulfilling the obligations which he has undertaken to discharge." (Lord Alverstone, C. J., in *Ogdens, Lim. v. Nelson*, 1903, 2 K. B. 297, 72 L. J. K. B. 767, 769. Cf. *Brace v. Calder*, 1895, 2 Q. B. 253, 64 L. J. Q. B. 582; *Inchbald v. Western Neilgherry Coffee Coy.*, 1864, 17 C. B. N. S. 733. 142 R. R. 603. See *infra*, 2, p. 341.)

Disclosure of trade secret as illustration of this rule.

In the English law a good illustration of the rule is the practice of granting an injunction to restrain the disclosure of a trade secret when this is a breach of faith.

Thus the court will restrain an ex-servant from publishing or divulging anything which has been communicated to him in confidence; or under a contract by him, express or implied, not to do so; and, generally, from making improper use of information obtained in the course of a confidential employment; also from using to his late master's detriment, information and knowledge surreptitiously obtained from him during the term of service. (*Amber Size Co. v. Menzel*, 1913, 2 Ch. 239, 82 L. J. Ch. 573. Cf. Cases in Copinger on *Copyright*, 5th ed. p. 35.

Large number of cases on interpretation.

The subject of the interpretation of contracts is one of the greatest practical importance. A large proportion of the cases which occupy the courts will always be questions as to the meaning of a particular contract. But the solution of each of these questions must depend upon the terms of the particular contract, taken in connection with the circumstances in which it was made. No rules can dispense the courts from discharging their primary duty of giving effect to what the parties intended. It is clear, therefore, that such rules as are given in the codes are not intended to be imperative directions, which the courts are bound to follow even against their better judgment, but are meant to be guides of which the courts may make use if they find it expedient. (B.-L. et Barde, 1, n. 552; Cass. 16 févr. 1892, D. 92. 1. 248.) If this consideration is borne in mind the rules stated in the French Code are well worth explaining. The principles which they lay down are principles of common sense by which a court will rightly be guided when the contract itself is ambiguous or uncertain. But there is after all only one fundamental rule of interpretation, and it is expressed in sufficiently correct language in the article of the Egyptian Code which provides *Agreements, whatever may be the literal meaning of the terms used, must be construed according to the purpose which the parties appear to have had in view, and the nature of the contract, and also according to custom* (C. C. E. 138.199); though the words at the end of the article in the Egyptian Code would have been clearer if it had been said that it was only in case of doubt that the

courts were to consider the custom. The nine rules which the French Code gives are taken from Pothier, who gives in addition three others which the French legislator did not think it worth while to reproduce, and the best commentary on the French articles is still to be found in Pothier's *Treatise*, from which they were borrowed. (*Oblig.* nos. 91 to 102.) But before explaining the rules it will be well to make two preliminary observations: (1) It may be disputed whether there is any contract at all. If so, this preliminary matter has to be decided by the court before any question of interpretation arises. The evidence may show that there was no *consensus in idem* upon the principles already explained in speaking of the formation of contracts. (*Supra*, pp. 186 *seq.*) Or it may show that although the terms of the agreement were settled, the parties had agreed that the contract should be put in writing, and that this had not been done. In this case the intention of the parties may have been that there was to be no contract until the writing was executed, and until that was done either of them might resile. And according to some French authorities there is a presumption to this effect when the parties have expressed their intention to put the contract in writing, and the party who wishes to show that there was a completed contract in spite of this agreement has the burden of proof. At any rate, this will be so when the only agreement between them is verbal, though it may be otherwise when they draw up a provisional writing with the understanding that it is to be replaced by a more formal document. (Demolombe, 24, n. 36.) But, according to the prevailing opinion, the presumption is that the parties intended to be bound by the verbal or informal agreement, and made provision for the more formal document merely in order to secure better evidence of what they had agreed upon. It is, of course, not denied that the parties may have intended to postpone the binding effect of their agreement until the writing had been executed, and that if this intention appears it must receive effect. (B.-L. et Saignat, *Vente*, n. 186; D. N. C. C. art. 1582, n. 234; Planiol, 2, n. 974. Cf. German Code, art. 154.) In such a case, therefore, if the writing was never executed, the result of the examination would be to show that there was no contract at all.

(2) Where it is established that the contract exists and the intention of the parties is clear there is no room for interpretation. It is not for the court to vary the contract which the parties have made. It is the duty of the court to enforce the contract as it

stands, unless it is challengeable upon some legal ground, such as that it is contrary to public policy, or that the party against whom it is sought to be enforced consented to it in error or in consequence of fraud or violence. Where there is no legal ground of challenge the simple duty of the court is to enforce the contract as it stands, however inequitable it may appear to be. This point has been already noticed in discussing contracts against public policy. (*Supra*, p. 106.) *Les tribunaux n'ont aucun pouvoir pour modifier, même sous prétexte d'équité, les conventions librement consenties par les parties ou pour y ajouter des stipulations nouvelles: ils ne peuvent que faire observer ces conventions.* (C. A. Alex. 3 juin 1896, B. L. J. VIII, 313.) The language of Sir G. Jessel, M. R., in an English case is equally sound in the French law. "If there is one thing which more than another, public policy requires, it is, that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred, and shall be enforced by courts of justice." (*Printing and Numerical Registering Co. v. Sampson*, 1875, L. R. 19 Eq. at p. 465, 44 L. J. Ch. 705.) This primary duty of the courts is affirmed in numerous cases and is a thoroughly established rule. (B.-L. et Barde, I, n. 556; D. N. C. C. art. 1156, n. 1; C. A. Alex. 22 déc. 1897, B. L. J. X, 56; C. A. Alex. 3 juin 1896, B. L. J. VIII, 313; C. A. Alex. 13 juin 1894, B. L. J. VI, 345.) It is so important that it will be well to give one or two illustrations. An insurance company appointed an agent, V, on these terms: "The company expressly reserve the right to revoke the mandate and appoint another agent for any reason whatever, and without any previous notice, and in that case the said V or his representatives shall have no claim to any indemnity whatever. Notwithstanding this clause, V, being dismissed, sued for damages, and was awarded them. The Court of Cassation in quashing this judgment said no question of interpretation arose. The rule laid down in C. C. F. 1156 that the court must not adhere to the literal meaning of the contract, "is made only for cases where the meaning of the clauses of the contract is doubtful and requires interpretation. But to allow the judge to substitute the alleged intention of the parties in the place of a clause which presents neither obscurity nor ambiguity would be manifestly to invest the court with the right to alter and even to change the character of the agreement." (Cass. 10 nov. 1891, D. 92. I. 406.) Upon this principle the courts are not entitled, as a general rule,

to allow a debtor to perform his contract *per equipollens*, i.e., by giving or doing something other than that which was promised, though this may be equally beneficial to the creditor. (*Infra*, 2, p. 451.) It is no real exception to this rule that the debtor is allowed to perform his contract in this way by an equivalent when the parties appear to have contemplated this possibility. Thus, if payment is stipulated in *louis d'or*, it may be made in some other currency if it appears that the parties had no intention to make the payment in *louis d'or* essential. As the court cannot vary unambiguous agreements they have in principle no power to fix a term of payment if the parties have not done so. The circumstances of the case may show that execution was intended within a certain delay. If grain is bought for seed and this is known to the seller it is clearly intended that he shall deliver it before the period of sowing has passed. (C. A. Alex. 11 avril 1917, B. L. J. XXIX, 360.) But in obligations to give or to do if the parties have fixed no term of payment this cannot be because they intended the debtor to be able to delay performance indefinitely. They must have contemplated performance within a reasonable time, and, therefore, the court will not be varying their intention if it decides what time is to be considered as reasonable in the circumstances. So, in a Quebec case, where a contractor had received advances upon a contract to build a house, and no time was fixed for the completion of the building, it was held that after he had been put in default, the court had the power to issue a judgment ordering him to finish the building within a certain delay. (*Bégin v. Carrier*, 1907, R. J. Q. 33 S. C. 1.) But in contracts other than those to give or to do the courts will be very slow to intervene to fix a term.

Express power to vary contract may be given by law.

It is of course perfectly competent for the legislator to give the courts the power to vary contracts of a particular class where this appears to be desirable. Such a power to reform or modify a contract is sometimes found in regard to contracts with money-lenders. This is so, for example, in England under the *Money-lenders Acts*, 1900 and 1911 (63 & 64 Vict. c. 51; 1 & 2 Geo. 5, c. 38). See Leake on *Contracts*, 6th ed. p. 538; Anson on *Contracts*, 14th ed. p. 220. But apart from such cases of special legislative power being given by particular enactments, there are a few cases in which the codes themselves relieve the courts from the necessity

to which they are otherwise subject of giving effect to the contract as it stands. Thus by C. C. F. 1244, although the time for payment of a debt has arrived, the courts have discretion to allow a moderate delay for payment, but they are told to use this power with great reserve. And a similar power is given in the Egyptian codes where the courts are authorised in exceptional circumstances to allow performance by instalments, or to fix a moderate delay for payment if this does not cause a serious prejudice to the creditor. (C. C. E. 168, 231.) And by another article it is provided that *the Court may, for serious reasons, grant a moderate extension of time to the purchaser for payment of the price due from him, subject, if necessary, to the thing sold being sequestrated. Only one such extension of time can be granted.* (C. C. E. 333, 414.) The Egyptian courts have uniformly held that the power to grant delay under these articles—*délai de grâce*—is one which must be exercised with extreme caution, only in exceptional cases, and when it is not prejudicial to the creditor. (C. A. Alex. 11 mai 1911, B. L. J. XXIII, 315; C. A. Alex. 15 juin 1911, B. L. J. XXIII, 368. See *infra*, 2, p. 452.) There is another case where the Egyptian Code gives express power to modify an agreement. This is by the provision that in the case of mandate the remuneration agreed upon by the parties may be revised and modified by the court. (C. C. E. 514/628.) The French Code does not contain any article expressly giving a power of this kind. But, nevertheless, the courts hold that such a power exists, and they are in the habit of reducing the remuneration promised to a mandatary when it appears to them excessive. (Cass. 27 janv. 1908, D. 1908. 1. 155.) Many writers deny that under the French Code the courts have any such power in the absence of any fraud on the part of the mandatary. (B.-L. et Wahl, *Contrats Aléatoires*, n. 738; Planiol, 2, n. 2236; Note to D. 90. 2. 281, remuneration of advocate; D. N. C. C. art. 1999, n. 152.) It is indeed very difficult to understand upon what ground the French courts claim the power to modify a contract of this kind while admitting that in other cases they are bound to give effect to the agreement of the parties. Probably the explanation is historical. In the Roman law mandate was essentially gratuitous, and anything paid to the mandatary was looked upon as in the nature of a present. It was frequently arranged between the parties that the mandatary was to receive some recognition of this kind. But if the present so stipulated was of a considerable amount the magistrate would

order its restitution or reduction. (Dig. 17. 1. 36. 1; Girard, *Manuel*, 5th ed. 584.) But whatever may be the explanation, the Egyptian Code is quite clear upon the subject, and this article forms the most important exception to the rule that contracts must be enforced according to their terms. So, for example, the court may reduce a sum promised by a client to his advocate, and that even when the client has given a promissory note for the amount before the completion of the mandate. (C. A. Alex. 20 mai 1908, B. L. J. XX, 240. See Halton, 2, 230.) There is another case of a much more doubtful character in which the Mixed Court of Appeal has held that it is not bound to give effect to the stipulations of the parties. When the parties to a contract have stipulated a clause of penalty, in the event of breach, the courts have no power to modify the penalty although it may appear to be in the circumstances excessive. (C. C. E. 123/181: C. C. F. 1152; B.-L. et Barde, 2, n. 1373. *Infra*, 2, p. 392.) But when there has been a breach of the contract, but it is a breach which has not caused the plaintiff any damage at all, is he still entitled to claim the penalty? According to most authorities this question must be answered in the affirmative. (B.-L. et Barde, l.c.; D. N. C. C. art. 1229, n. 7.) But according to another opinion, the penalty being a sum which is to take the place of the damages suffered by the creditor, where there are no damages there should be no penalty. This is discussed elsewhere under Obligations with a Penal Clause. (*Infra*, 2, p. 397.)

Doubtful if such discretion should be given to the courts.

It is very doubtful if it is wise to allow the courts such a discretion to vary the contract which the parties have made by granting delay for payment, or, in the case of mandate, by reducing the remuneration fixed. Probably it is more in accordance with public policy that persons of full age and capacity should be absolutely bound by their contracts and that the courts should have no power to intervene unless the contract is challengeable upon some definite legal ground such as fraud. The Civil Code of Quebec does not give to the courts any such discretionary power as is permitted by the French and the Egyptian Codes, nor is such power given by the Swiss Code of Obligations or by the German Code. The German Code, however, contains a very important provision of a more general character which gives the courts a considerable power to control contracts of a usurious or

an exorbitant nature. Under this article a contract is null *ab initio* under which one of the parties by taking advantage of the necessity, the frivolity, or the inexperience of another, has obtained from him a promise or a payment of money or money's worth which in the circumstances was altogether disproportionate to that which was promised or given in return (art. 138). If it is desirable to allow the courts to interfere with contracts, and especially with usurious contracts, a provision in some such terms as these would seem best to meet the necessities of the case.

The English courts have, in addition to their powers under the Money-lenders Acts which have been mentioned above, a discretion to refuse to enforce performance of a contract which appears to have been obtained by what is called "undue influence." The presumption of such undue influence is raised by certain parental or fiduciary relations between the parties. The subject has been briefly noticed earlier under the head of Violence. (See *supra*, p. 306; Anson, *Contracts*, 14th ed. p. 218; Pollock, *Contracts*, 8th ed. p. 640.)

Inadmissibility of oral testimony to vary a written contract.

The rule in civil cases that where there is a valid contract in writing it is not competent to examine witnesses to contradict it, or to vary it by proof that parties meant something different from what they have said, belongs to the subject of proof of obligations. (C. C. F. 1341; C. C. Q. 1234.)

The Egyptian Code does not contain an article to this effect, but it appears that it was omitted merely as being a self-evident proposition. (C. A. Alex. 10 déc. 1891, B. L. J. IV, 48; C. A. Alex. 30 janv. 1902, B. L. J. XIV, 106; C. A. Alex. 2 janv. 1908, B. L. J. XX, 46; C. A. 20 janv. 1914, O. B. XV, n. 119.) The rule has no application in commercial cases. (C. C. F. 1341; Larombière, art. 1341, nos. 36, 37; D. N. C. C. art. 1341, n. 162. See C. A. Alex. 25 avril 1906, B. L. J. XVIII, 211; C. A. Alex. 20 déc. 1905, B. L. J. XVIII, 46.)

Commercial contracts are so constantly made by verbal agreements or by informal writings that it is necessary in these cases to leave to the courts a much wider discretion to rely on the testimony of the parties and of others.

Proof of negotiations prior to contract.

The contract whether oral or written is to be regarded as expressing the final conclusion of the parties, and it is not competent to seek to vary it by evidence as to what the parties said or wrote during the negotiations which led up to the contract. (C. C. F. 1341; B.-L. et Barde. 3. n. 2570.) This also belongs to the subject of proof.

The nine rules of interpretation.

It will be useful to examine in order the nine rules of interpretation which are given in the French Code, for, although the Egyptian Civil Code has reproduced only three of them in a somewhat modified form, there is no reason to think that this was from any doubt as to the soundness of the rule stated in the French Code. It is quite reasonable to say that such rules as some of those which the French Code gives, have no proper place in a code which professes to lay down only the rules of positive law binding upon the courts. But if we regard them merely as a collection of guiding principles to be applied by the courts according to their discretion they deserve careful consideration. (Cf. C. C. F. 1156—1164; C. C. E. 138—140/199—201.)

Rule 1.

In agreements we ought to seek to discover the common intention of the contracting parties rather than to adhere strictly to the literal meaning of the words. (C. C. F. 1156; C. C. Q. 1013.)

The Egyptian Code says: *Agreements, whatever may be the literal meaning of the terms used, must be construed according to the purpose which the parties appear to have had in view, and the nature of the contract, and also according to custom.* (C. C. E. 138/199.) In England the maxim commonly cited is *qui hæret in litera hæret, in cortice*. He who considers merely the letter of an instrument goes but skin-deep into its meaning. (See Broom, *Legal Maxims*, 7th ed. p. 519.) The doubt may be as to the meaning of an expression or of a particular word, but in either case the rules of interpretation are the same; the court must study the whole document to see whether what is doubtful in one place is not made clear in another, for if the parties have themselves supplied an explanation this will be the most authori-

tative gloss. (See note to D. 1902. 1. 241.) If, however, no light can be found in this way the court may inquire whether the parties used an expression or a word in some special sense. For, although it is to be presumed that the parties intended their language to bear its ordinary meaning and employed words in the sense in which they are commonly understood, this is, after all, merely a presumption. They may have used a term or a word in a sense peculiar to some locality or to some business, and, if this is so, it is the duty of the courts to give effect to what they really meant. There are many cases in which the courts come to the conclusion that the literal or dictionary meaning of a word was not the meaning which the parties intended it to bear in their contract. And in order to arrive at their true intention it is competent to prove by oral testimony the circumstances in which the contract was made. By knowing the relation in which the parties stood to each other and the nature of their business, and, in general, the circumstances attending the contract, the court is in the best position to understand what the parties meant. Such evidence is not for the purpose of contradicting or varying the contract but for that of discovering the true intention of the parties. For example, a contract of fire-insurance contains a clause that the assured shall declare if he has ever had any fires before. The dispute is if this means *any fires at all* or any fires in the immoveables insured. It is competent to examine expert witnesses as to which of these interpretations they would put upon the contract. (Cass. 31 mars 1886, D. 87. 1. 8.) Even in such civil contracts as can be proved only by writing, the written contract of which the meaning is in dispute may be a commencement of proof in writing, which can be supplemented with evidence as to the circumstances. (Demolombe, 25, n. 9; Laurent, 16, n. 503; D. N. C. C. art. 1156, n. 69.) Applications of the rule that it is not the literal meaning of the terms but the common intention of the parties to which the courts must give effect are of daily occurrence. But it is not worth while multiplying illustrations because the decision of each case turns upon its own particular facts. (See Cass. 19 janv. 1869, D. 72. 1. 96; Paris, 30 mai 1888, D. 90. 2. 31; C. A. Alex. 8 mai 1901, B. L. J. XIII, 306; C. A. Alex. 17 mars 1903, B. L. J. XV, 199; C. A. Alex. 9 mars 1899, B. L. J. XI, 152.) In a Canadian case where a claim was made under a policy of marine-insurance, and the defence was that the vessel had deviated from the route conten-

plated by the underwriters, the point was whether the Guano Islands, which are from 25 to 40 miles away from the coast of South America could be considered to be "on the coast." Under the policy the ship was to sail to "a loading port on the western coast of South America." She sailed to Lobos, one of the Guano Islands, and was wrecked. Upon the evidence of shippers and underwriters that they would understand the words "on the coast" to include these islands, the defence was not sustained by the court. (*Providence Washington Insurance Co. v. Gerow*, 1890, 17 Canadian Supreme Court Reports, 387.)

Name given by parties to contract is not conclusive.

Upon the principle that the literal meaning of the words of a contract is not always conclusive as to the intention of the parties, it is a well settled rule that the courts are not bound by the name which the parties have given to their agreement.

Either from ignorance or from design the parties may have given a name to their contract which does not correspond to its true nature, and in such a case it is the duty of the court to give effect to what the parties meant rather than to what they said. (B.-L. et Barde. 1, n. 557; Cass. 22 févr. 1887, D. 87. 1. 500; C. A. Alex. 8 mai 1901, B. L. J. XIII, 306.) *C'est une règle générale que ce que font les parties prévaut sur ce qu'elles disent.* (C. A. Alex. 2 janv. 1919, B. L. J. XXXI, 93.)

The parties to the contract may speak of themselves as vendor and purchaser, or as lessor and lessee, or as partners, and, nevertheless, upon the construction of their contract, the court may find that the first contract was not sale, nor the second lease, nor the third partnership. What the parties call a sale may be a lease, or it may be an innominate contract which is neither sale nor lease, but whatever its character, so long as there is nothing unlawful in it, the court will give effect to it, irrespective of the designation given to it by the parties.

It is, of course, when it becomes a question of practical importance whether a contract is correctly designated by the parties that the courts are called upon to interpret it. There are many cases in which the name is immaterial, but there are others in which the rights of parties vary greatly according as the contract is held to be, for example, a sale or a lease. So a party who is described in a contract as a lessor may claim in that character

that the debt to him is privileged, whereas if the contract is a sale, he will have no such privilege.

According to the French jurisprudence, the right to extract from the soil products such as stone, or coal, which do not grow like fruits periodically, is in its nature a sale, whatever the parties may call it. The hire of things is a contract under which the lessee gets the enjoyment of a thing without consuming it. It is possible, though uncommon, to hire fungibles, on the footing that they are not to be consumed, as, if one were to hire a wedding cake with the stipulation that it was not to be eaten but that it should be returned after the ceremony to the pastry-cook. But if the owner of land gives to another the right to extract stone from it for a certain period and to pay so much by weight or measurement for the stone which he takes out, how can this be a lease? The stone will not grow again in the earth. What is taken out is gone and is a partial alienation of the immoveable itself. The so-called lessor will have no lessor's privilege to guarantee the payment of the price. (Civ. 4 août 1886, D. 87. 1. 36; B.-L. et Wahl, *Louage*, 3rd ed. 1, n. 8, and n. 781; Pothier, *Louage*, n. 11. Cf. Req. 12 juin 1901, D. 1903. 1. 349; and, in Quebec, *Hendershott v. Lionais*, 1905, R. J. Q. 27 S. C. 292.)

Some of the writers do not agree with the jurisprudence. (Guillouard, *Louage*, 1, n. 14.)

So, also, the question whether a man is a partner or not may be one of considerable delicacy. The loan of money to a man to enable him to become a partner in a firm does not necessarily make the lender a partner even though he is to be paid back out of the profits of the business. (C. A. Alex. 8 mai 1901, B. L. J. XIII, 306.) Or, again, it may be a very practical question to decide whether a contract is a sale or a pledge.

The creditor who bargains for a pledge to secure the payment of the debt does not get a real security until he has got the possession. (C. C. F. 2076; C. C. Q. 1970; C. C. E. 540, 662.) So where A "sold" to B ten engines, but went on to say "to be held by him as collateral security," and A became insolvent before the engines had been delivered to B, the question was whether they belonged to B or to A's creditors. The parties had called their deed a sale, but, on the other hand, in a sale the buyer does not hold what he has bought "as security."

Accordingly, it was held in a Canadian case, that the parties meant the contract to be a contract of pledge, and that the pledgee

had not acquired any real right over the engines seeing that they had not been delivered to him.

They were not his, because he had not bought them, and although his debtor had promised to pledge them to him, yet the pledge, not having been completed by delivery, was invalid as against the creditors of the pledgor. (*Fairbanks v. Barlow*, 1886, 41 Canadian Supreme Court Reports, 217. Cf. *Whitney v. Joyce*, 1903, R. J. Q. 14 K. B. 406. See C. C. E. 267, 540/337, 662.)

Contract interpreted by execution.

Where a contract is ambiguous and the parties have acted upon it, the manner in which they have executed the contract will be the best interpretation. If one of the parties has allowed the other to do something in virtue of the contract, and has made no protest, a contention by him after a lapse of time that his adversary had no such right will not be received with any favour. There is no better way of judging of what the parties intended by the contract than seeing what they actually did in carrying it out. We cannot look at their acts and words prior to the contract or during the negotiations in order to contradict or vary the contract itself, for during the negotiations there may have been many changes of mind on the side of one or of both of the parties. The law presumes that the final result of their deliberations is to be found in the terms of the contract. But if we want to discover their own understanding of the contract there can be no better guide than their conduct in carrying it out. (*Démolombe*, v. 25, n. 36; *Huc*, 7, n. 175; *Req.* 7 avril 1840, *D. Rép. Oblig.* n. 865; *Pand. Franç. Oblig.* n. 8098, n. 8116; *C. A. Alex.* 18 mai 1899, *B. L. J.* XI, 244; *C. A. Alex.* 7 janv. 1892, *B. L. J.* IV, 99.) In commercial contracts, particularly, this rule is constantly applied. *L'exécution que les parties elles-mêmes ont eue doit donner à leurs obligations contractuelles en constitue la meilleure interprétation, la bonne foi qui préside aux transactions conférant à cette règle une valeur toute particulière.* (*C. A. Alex.* 16 mars 1916, *B. L. J.* XXVIII, 333.) But it applies also to civil contracts. Where, for instance, a piece of land has been sold and the boundaries have been expressed in an ambiguous way, so that it is a question whether a strip of land was included in the conveyance, the contention of the buyer that it was so included will be greatly strengthened if the seller had allowed him to take and retain possession of this strip. (*City of Quebec v. North*

Shore Ry. Co., 1896, 27 Canadian Supreme Court Reports, 102. Or where the question was if a servitude included the right of laying a pipe in the servient land the fact that the pipe was placed in position, and allowed for some years to remain there, was treated as a very important aid to the interpretation of the deed. (*Cliche v. Roy*, 1907, 39 Canadian Supreme Court Reports, 244.) But this rule must not be carried to an unreasonable length. It is possible that one of the parties or both of them may have fallen into a mistake as to what had actually been agreed upon, and, in consequence of this mistake, may do something or allow something to be done which, as is perceived afterwards, was not contemplated in the contract. (Cf. C. A. Alex. 30 nov. 1898, B. L. J. XI, 24.)

Rule 2.

When a clause is susceptible of two meanings it must be understood in that in which it may have some effect rather than in that in which it can produce none. (C. C. F. 1157; C. C. Q. 1014.) There is a presumption that the parties did not insert a clause which was quite unnecessary. So, where a clause was inserted in a deed of sale that the buyer should take the risk of servitudes, it was held that this meant that the seller excluded his warranty of non-apparent servitudes. It would have been useless to say that he excluded his warranty of apparent servitudes, because by law he is not bound to warrant the buyer against them. (Trib. Civ. Gannat, 7 juin 1889, D. 91. 2. 166; B.-L. et Barde, 1, n. 560. Cf. Cass. 8 juill. 1874, D. 75. 1. 112; Cass. 3 avr. 1912, D. 1915. 1. 71. The last case is a good instance, but the facts are too long to state.) But this rule also must not be carried to an extreme length. It is by no means uncommon for parties to insert clauses which are entirely unnecessary and merely express their legal rights. In a lease, for example, the landlord may bind himself merely to do the things to which he would have been bound without stipulation. The express declaration is in a sense useless, but it has at least the value of reminding the parties of their legal rights, and it would be a false interpretation to give to such a clause an unnatural and strained meaning in order to make it "useful." We must never lose sight of the first rule, which is to give effect to the intention of the parties. Moreover, it sometimes happens that the court has to choose between two interpretations, of which one would make the stipulation contrary to law or to public morals, and cause the contract to be null, and

another interpretation, according to which the clause would merely be useless and unnecessary. In this case the duty of the court is to prefer the interpretation which would allow the contract to receive effect. There is a presumption that the parties intended to do something that was lawful rather than something that was unlawful, but this is merely a presumption, and it is only when the clause is ambiguous that this rule has any application. If the parties have clearly shown their intention to do something unlawful, the court must interpret the contract according to this intention, although it renders the contract null. (B.-L. et Barde, 1. n. 560; *Pand. Franç. Oblig.* n. 8144; Trib. paix Lorgues, 15 févr. 1907, D. 1907. 5. 36.)

Rule 3.

Expressions susceptible of two meanings must be taken in the sense which agrees best with the matter of the contract. (C. C. F. 1158; C. C. Q. 1015.) The parties to a contract of one of the ordinary kinds, such as a sale or a lease, are presumed to have in mind the rules of law which apply to such contracts, and if it is a question whether a stipulation in their contract is to be understood as merely a statement of the ordinary rules of law, or, on the other hand, as a departure from ordinary rules, the presumption will be in favour of the former interpretation. Pothier gives the following examples: In a lease it is said that the tenant is to make "repairs." This will be understood to mean "tenant's repairs"—*réparations locatives*—that being the sense which agrees best with the matter of the contract, viz., the lease of a house. Here there is a conflict between rule 2 and rule 3. By understanding "repairs" as "tenant's repairs" we are making the clause of none effect, for the tenant under the French Code is bound by law to make such repairs. It is, however, more likely that an unnecessary clause was inserted, a thing which is common enough, than that "repairs of every kind" was intended. If the tenant had meant to undertake landlord's repairs we should expect this to have been stated in express terms. (*Oblig.* n. 93.) Under the Egyptian Code this particular instance would not occur seeing that by the Egyptian law, in the absence of agreement to the contrary, the lessor is not bound to make any repairs. (C. C. E. 370/453. Contrast C. C. F. 1754.)

The sense which agrees best with the matter of the contract will be the sense in which the term is generally used in contracts of that kind. In technical matters the parties presumably employ

words in their technical sense, and in construing a commercial contract the presumption is that the terms are used in their business sense. (See *Gerow v. Providence Washington Insurance Co.*, 1890, 17 Canadian Supreme Court Reports, at p. 392.) In a particular trade it may be that terms are used in a sense different from that which they have in popular language. And in a contract made by persons engaged in the trade the presumption is that they use the terms in the sense in which they are employed in that trade.

Rule 4.

Whatever is doubtful must be determined according to the usage of the country where the contract is made. (C. C. F. 1159; C. C. Q. 1016.) It is a natural and reasonable presumption that the parties to a contract have in mind the usages of the country where they make it. With these usages they are probably familiar, and in fact so familiar that they take them for granted. Pothier gives the following examples: I make a contract with a vine-dresser that he shall cultivate my vineyard for so much a year, and I do not specify how many times it is to be dressed. The law will presume that the bargain was for so many dressings—labours—as is usual in the district. (*Oblig.* n. 94.) This is a good enough example of a contract which is to be executed at the place where it is made. In such a case if it needs to be interpreted by local usage there is no doubt as to what locality the parties had in mind. But a more difficult question arises when a contract is to be executed in a different locality, or even in a different country, from that in which it was made. In this case the parties may frequently have in mind the custom of the country or place where the contract is to be executed, and if this appears to have been their intention it is the duty of the court to give effect to it. For instance, if you and I are both in Cairo and I sell to you a house which I own in London, it is probable that we intended to incorporate in our contract the usages of London rather than those of Cairo. (Demolombe, 25, n. 17; Bruxelles, 28 déc. 1863, Pasierisic Belge, 64. 2. 283.) This principle applies not only to the interpretation of the terms used, but also when we have to determine what law the parties intended to apply to their contract. When a contract is made in one country and is to be executed in another, the court has to decide whether the parties intended their contract to be governed by the law of the country in which it was made, or by that of the country in which

it was to be executed. The discussion of this question belongs to the subject of private international law. But it may be said here that the question always is purely one of fact. The court is perfectly free to decide each case according to its particular circumstances, and the only rule is that the law which governs the contract must be that which the parties intended. (Weiss, *Traité de Droit International Privé*, 2nd ed. 4, p. 352; Laurent, *Droit Civil International*, 7, n. 480; Surville, *Contrats par Téléphone*, in *Journal du Droit Intern. Privé*, 1910, v. 37, p. 776.) The circumstances may indicate such an intention. It may be that the contract is one of a kind practically unknown in the country of one of the parties, but quite familiar in the country of the other party. It will be a natural presumption in such a case that the parties intended their contract to be governed by the law of the latter country. (See Surville, *loc. cit.*) Sometimes a contract would be invalid by the law of the country in which it is made, but valid by that of the country in whose courts it is sought to be enforced. In such a case the contract will receive effect if the court is satisfied that the parties intended it to be governed by the law of the country in which the action relating to it is brought, and under which law such a contract is valid. There is no difference in this matter between the English and the French law, and an English case affords an excellent illustration. A contract was made in Boston, Massachusetts, between an American citizen and a British company of shipowners by which the company undertook to carry some cattle from Boston to England in a British ship. The contract contained a clause that the company should not be liable for the negligence of the master or crew of the ship. Such a clause was valid by English law and void by the law of Massachusetts. The bills of lading containing the contract were in English form. The cattle were lost by the negligence of the master and crew, and the shipper sued the company for the damages in England. The court held that the contract itself showed the intention of the parties that it should be governed by English law, the stipulation exempting the company from liability was valid under that law, and therefore the action was dismissed. (*In re Missouri Steamship Co.*, 1889, 42 Ch. D. 321, 58 L. J. Ch. 721.) This is not a case of the interpretation of words; it raises the broader question what law did the parties intend to govern their contract, and I merely refer to it as showing that the same rule applies, viz., that the intention of the parties is to receive effect.

But the court will not give effect to a contract which is against public order by the *lex fori*, although it may be valid by the *lex loci contractus*. (Weiss, A., *Traité de Droit International Privé*, 2nd ed. 4, p. 375; Dicey, *Conflict of Laws*, 2nd ed. p. 553.) So where a French merchant in a contract of affreightment with an English shipowner had agreed to exempt the shipowner from responsibility for the fault of the captain, the *Cour de Cassation* held that the merchant was not bound by the clause of exemption, it being regarded by French law as against public policy. (Cass. 12 juin 1894, Sir. 1895. 1. 161; *Journal du Droit Internat. Privé*, 1894, pp. 806 *seq.*) It may be doubted if such a clause ought to be considered as against public order. (See the note of M. Lyon-Caen in S. 1895. 1. 161, and Weiss, A., *Traité de Droit Internat. Privé*, 2nd ed. 4, p. 378.)

When the French Code says that what is ambiguous is interpreted by the usage of the country where the contract is made, the legislator is thinking of a variety of cases. The question is not always that of interpreting particular words. Thus, in Pothier's example of the contract with the vine-dresser, the question for the court was to what local custom did the parties intend to submit themselves. There was no question of interpreting the word *labours*, for that term was never mentioned. On the other hand, the case may be one of interpretation in the strict sense of the term. A word is used which has one meaning in one place and a different meaning in another place. For example, a contract speaks of 20 *arpents*. But an *arpent* corresponds to a different measure in different districts or countries. Or a bill is drawn at Constantinople for 100 "pounds." Are we to understand Turkish pounds or English pounds sterling? In such cases there is a slight presumption that the parties are using terms in the sense in which they are used in the place where the contract is made. (B.-L. et Barde, 1, n. 562.) But this presumption is easily displaced. Thus in the case of a sale by weight or measure between persons living in countries where the words for these weights or measures do not mean the same thing, the presumption will rather be that the parties intended the weights and measures named to be those of the place where the delivery was to be made. (D. N. C. C. art. 1159, n. 6.) So, if a man who is travelling sells a farm which he possesses in his own country and describes it as containing 100 *arpents*, and the *arpent* of the place where he makes the contract is larger than the *arpent* of the district in which the farm lies, are we to understand *arpent*

in the sense in which it is used in the district in which the contract was made? Clearly not. It is presumably used in the sense of the district in which the farm is situated.

Where the parties are making a contract away from their home they may very likely have in view the usages of their own country rather than those of the country where they make the contract, and they may use words in the sense familiar to them though the words may bear a different signification where they made the contract. If they get a deed drawn up by a notary or a lawyer he may use terms in a local sense which the parties never intended, seeing that they do not belong to this locality. And in such a case the court would be violating the rules of interpretation if it substituted for the will of the parties the thought of the notary or lawyer who drew up the deed. (Laurent, *Droit Civil Internat.* 7, n. 480.) If no usage can be proved which is sufficiently settled to throw light upon the intention of the parties the doubt will be resolved in favour of the debtor. (Demolombe, 25, n. 18.

Rule 5.

The customary clauses must be supplied in the contract although they be not expressed. (C. C. F. 1160; C. C. Q. 1017.) This is a most important rule and one of which there are innumerable illustrations. The parties to a contract frequently leave many things to be understood. If they enter into a contract of sale or of lease they have in mind the general rules of law applicable to these contracts. The presumption is that they intend those rules to apply to their contract if they say nothing to the contrary. The usage has not only the effect of interpreting obscure clauses or ambiguous terms, it may also determine the secondary conditions of the contract between the parties. (B.-L. et Barde, 1, n. 564.) And the parties have in view the law as it stands at the date of the contract. *Nemo censetur ignorare legem.* (Paris, 28 déc. 1905, D. 1911. 2. 388.) But we must remember that this incorporation of laws and usages in the contract is only when there is nothing in the contract itself upon the matter. If the parties have expressed their intention it is for the court to give effect to it. (Cass. 30 déc. 1879, D. 80. 1. 108.) But if they have only expressed their intention upon certain points the court may inquire into the usage to discover what they intended upon points as to which they were silent. In a certain sense this is adding something to the contract and this is generally

beyond the power of a court. The reason, however, why the addition is allowed in this case is that the parties would have put in the same provisions if they had thought it necessary. It is quite legitimate for the court to deduce from what the parties have said in regard to certain points in the contract what they would have said and really intended upon another point which perhaps did not occur to them, or as to which they thought the law was sufficiently clear. In the English law this principle has been applied to mitigate the harshness of the law as to the effects of war on contracts. In some circumstances the court assumes that it was an implied term of the contract that it should be discharged if its performance was rendered impossible by war, (*Infra*, 2, pp. 320 *seq.*) There are some kinds of contracts especially in which the parties seldom state their intention in full but leave a good deal to be implied. So, in the contract of the lease of a house, if nothing is said as to the nature of the use of the house, the implication is that it is to be used for the purposes for which it is designed. (C. C. E. 376, 461; C. C. F. 1728; C. C. Q. 1626.) The lessee must not turn a private house into an hotel, a shop into a stable, a residential flat into a shop, or make such other changes in the use of the house as the lessor cannot reasonably be considered to have contemplated. (Aubry et Rau, 4th ed. 4, s. 367; Paris, 21 janv. 1899, D. 1901. 2. 185, and note by M. Charles Robert. And, in commercial matters, doubtful questions are to be resolved by the usages of the trade to which the contract relates. (B.-L. et Barde, 1, n. 564. See Cass. 8 janv. 1912, D. 1912. 1. 192; Req. 29 mai 1902, D. 1902. 1. 343; *Loi du* 13 juin 1866; C. A. Alex. 3 mai 1905, B. L. J. XVII, 236.) As an eminent English judge expresses the principle: "In business transactions such as this, what the law desires to effect by the implication is to give such business efficacy to the transaction as must have been intended at all events by both parties who are business men." (*The Moorcock*, 1889, 14 P. D. 64, 68, 58 L. J. P. 73, *per* Bowen, L.J.) This was said in a case where a wharfinger had agreed with a shipowner to discharge his ship at a jetty belonging to the wharfinger. Owing to the size of the ship, and to the state of the river-bed adjoining the jetty, the ship took the ground and suffered damage. The wharfinger had taken no steps to ascertain whether the place was safe for such a vessel to lie. The shipowner brought an action against him for damages, and the wharfinger was held liable upon the ground that in letting out his jetty for use he had implied that he had taken reasonable

care to see that the berth was safe for such a ship. The question whether the stipulation is to be implied is always a question of intention. So far as it is possible to formulate a general rule it is that "Where the parties have made a contract which contains a variety of stipulations and is silent as to others, no stipulation or agreement which is not expressed ought to be implied unless it is necessary to give to the transaction the effect or efficacy which both parties must have intended it should have." (*Per* Lord Alverstone, C.J., in *Ogdens Ltd. v. Nelson*, (1903, 2 K. B. 297, 72 L. J. K. B. 770.) Where a contract between two parties has terminated and they enter into a new contract about the same matter, it may be implied that they intend the conditions of the old contract to apply to the new one, although they have not expressly said so. In the case of the lease of a house the codes have an express declaration to this effect; if the lessee is allowed to remain in possession after the lease has expired the lessor is taken as having agreed to renew the lease upon the same conditions for such a period as is fixed by local usage. (C. C. E. 386/471; C. C. F. 1759; C. C. Q. 1609.) But this is an illustration of a more general rule. In a Quebec case where a contract to erect a building had not been executed and had been allowed by both parties to lapse, and the parties afterwards entered into a new contract for the same work at an advanced price, it was held to be implied that they intended the other conditions of the old contract as to the time of performance, etc., to apply to the new contract. (*Pagé v. Connolly*, 1908, R. J. Q. 35 S. C. 121.)

In another case the publishers of a directory had for a number of years printed the names of subscribers in large type. A subscriber whose name appeared in the new directory printed in small type sued the publishers for breach of contract, and obtained damages on the ground that there was an implied contract to continue the former practice of printing subscribers' names in large type, seeing that notice to the contrary had not been given. (*Archambault v. John Lovell & Sons*, 1912, R. J. Q. 42 S. C. 344.)

Implied term that each party will honestly try to fulfil his contract.

The rule that contracts are to be executed in good faith has been explained above. (*Supra*, p. 358.) It is an implied term of all contracts that neither party will do anything which will prevent him from fulfilling his own obligation or which will

prevent the other party from performing his part of the contract. Contracts are to be executed in good faith. (C. C. F. 1134.)

Contracts in which many clauses are implied.

The law of implied clauses has been much discussed in cases as to the mutual rights respectively of the painter of a portrait and the sitter, of the photographer and the person who sits to him for a likeness, of the publisher and the author, of the writer and the receiver of a letter, and of the lecturer and the student who attends his lectures. In the case of the artist and the photographer there is, as a rule, no written contract and all the conditions except, perhaps, the price, are frequently left to be implied. The contract between the publisher and the writer is more usually in written form, but here also many points are, as a rule, left undetermined. In the case of the artist or the photographer, unless it is otherwise expressed, it is an implied term that the artist cannot exhibit the work publicly without the consent of the sitter. (Cass. 14 mars 1900, D. 1900. 1. 497; Trib. Civ. Seine, 20 janv. 1899, D. 1902. 2. 73, and note by M. Appleton; Lyon, 8 juill. 1887, S. 1890. 2. 241; note to Rennes, 23 nov. 1903, S. 1904. 2. 111.)

But the consent of the person painted or photographed to the exhibition or the sale of the picture or photograph may be implied from the circumstances. In particular when the photographer solicits from a public personage such as a famous politician or actor, the right to take his photograph, his consent generally implies permission to sell or to exhibit the picture. So, likewise, a model who sits to an artist gives thereby in the ordinary case a tacit consent to the exhibition of the picture, and cannot revoke her consent because she has quarrelled with the artist. (Rennes, 23 nov. 1903, S. 1904. 2. 111, D. 1905. 2. 69.) But the consent to the exhibition would not be valid if the picture were of an indecent character. (Paris, 26 mai 1867, S. 68. 2. 41.)

English law similar.

The principles of the English law are similar, though in many cases the protection is given by the *Copyright Act*, 1911 (1 & 2 Geo. 5, c. 46), or the *Fine Arts Copyright Act*, 1862 (25 & 26 Vict. c. 68), so that it is not necessary to invoke the implied contract. But it is still necessary in some cases to rely for protection upon the common law, according to which there is a right to

restrain the publication of a work or of information received from another in circumstances in which such a publication is a breach of trust or confidence. (Copinger on *Copyright*, 5th ed. p. 35; *Amber Size Co. v. Menzel*, 1913, 2 Ch. 239, 82 L. J. Ch. 573; *supra*, p. 358.) Thus it has been held that a photographer who is employed to take a photographic portrait of a customer is not entitled without the authority of the customer express or implied, to sell, dispose of, or publicly exhibit copies of the photograph. This is so by the general law, and irrespective of the provisions of the *Fine Arts Copyright Act*, 1862. (*Pollard v. Photographic Co.*, 1888, 40 Ch. D. 345, 58 L. J. Ch. 251.) In this case the reasons given by the court were that such a publication was a breach of contract, as the bargain between the customer and the photographer includes by implication an agreement that the prints taken from the negative are to be appropriated to the use of the customer only. And in the English law the copyright of a photograph made for valuable consideration belongs to the sitter, notwithstanding that the photographer retains the property of the negative. This is now so declared by the *Fine Arts Copyright Act*. (*Boucas v. Cooke*, 1903, 2 K. B. 227, 72 L. J. K. B. 741. See Copinger on *Copyright*, 5th ed. p. 34.)

A painter is the owner of his work until he has completed it to his own satisfaction and delivered it to the sitter. He may be liable in damages for breach of contract if he does not deliver it at the time specified or within a reasonable time, but he cannot be compelled to deliver it, for this would be to interfere with his intellectual freedom. The contract differs in this important respect from the sale of a moveable article, and according to the *Cour de Cassation*, it is not a sale at all but a contract *sui generis*. (Cass. 14 mars 1900, D. 1900. 1. 497.) The Supreme Court of the German Empire has gone further in holding that an artist has certain rights over his work even after it has been sold and delivered to the buyer, and while it remains in the hands of the original purchaser. He has a legitimate interest that his work shall not be presented to the world otherwise than in the form in which it represents his artistic individuality. The owner of the work of art may remove it from public view, and it is probable that he would be within his rights if he were to destroy it. With such possibilities the artist must reckon when he sells his work. But it is an implied term of the contract that the individuality and integrity of the work shall not be violated while it exists as a work of art and is liable to be viewed and criticised by

strangers. A lady who owned a house in Berlin engaged a well-known artist to decorate the vestibule with frescoes, giving him full discretion as to the subjects. The painting when finished represented an island with some nude figures of sirens.

The lady who had ordered the painting paid for it, but as she did not like the nude figures she engaged another artist to over-paint them so that they appeared as draped.

The first artist contended that this alteration violated rights which, as an artist, he had in the integrity of his work, and although the owner covered the altered portions of the frescoes by a curtain so that casual passers-by could not see them, the artist was not satisfied but brought an action demanding the restoration of the painting to its original condition, or else its entire withdrawal from a place where it might be visible to strangers. The court held that the overpainted drapery must be removed. (79 *Entscheidungen des Reichsgerichts*, 397. See 26 *Harvard Law Review*, 654.) The right of the artist not to have his work altered and passed off as his may be protected to some extent by statute when it is copyrighted. Under the English enactment it is forbidden to sell a picture or photograph which has been altered and pass it off as an unaltered work, if the alteration is such as might affect the character or reputation of the artist. (*Fine Arts Copyright Act*, 1862 (25 & 26 Viet. c. 68), s. 7, clause 4. See *Carlton Illustrators v. Coleman*, 1911, 1 K. B. 771, 80 L. J. K. B. 510.) As to the photographer, the implied contract has been the subject of much discussion in the courts. The photographer generally retains possession of the negative, and, according to the prevailing view, he is the owner of it, though, according to some authorities, the negative is the property of the person who ordered it, but in any case, the photographer can make no use of the negative without the consent of the person whose features have been reproduced. (Pouillet, *Traité de la Propriété Littéraire et Artistique*, 3rd ed. n. 284, and n. 374; *Pand. Franç.* vo. *Propriété Littéraire*, n. 222; Paris, 3 janv. 1908, S. 1908. 2. 238; Sirey, *Table Décennale*, 1901—1910, vo. *Propriété Littéraire*, n. 79; Sirey, *Table Décennale*, 1881—1890, vo. *Prop. Litt.* n. 19.) And it has been held in France that even after the subject of the portrait has allowed the photographer to reproduce copies he may withdraw his consent, though in some circumstances he might be liable in damages if he did so. (Paris, 25 mai 1867, S. 68. 2. 41; *Journal du Palais*, 68, p. 216; *Pand. Franç.* vo. *Prop. Littéraire*, n. 231.) When a model has sat to

an artist and has been presented by him with proofs of a photograph of the picture, this does not give the model the right to have reproductions made for sale. This is against the implied contract. (Trib. Seine, 20 janv. 1899; Sirey, *Table Décennale*, 1901—1910, vo. *Propriété Littéraire*, n. 79.) The right of the photographer being founded upon contract, it is not to be extended beyond what is implied in the contract. It follows, rather curiously, that a photographer may have a wider right of dealing with a photograph of a person who never gave any consent to have his likeness taken at all, than he has with a photograph taken by agreement with the sitter. For, perhaps, it is not as yet quite settled that it is a legal wrong to take a man's photograph without his consent and even to reproduce it. If the photograph were to represent him in such surroundings or in such a way as to be calculated to affect his reputation injuriously or to make him ridiculous, there can be no doubt that a claim of damages would lie. (Cass. 23 avr. 1903, S. 1904. 1. 173; C. d'appel de Bruxelles, 26 déc. 1888, S. 91. 4. 35, exhibition of waxwork model of criminal.) So, when a surgeon was photographed without his consent in the act of performing an operation, and the photograph was reproduced in a cinematograph, it was held he was entitled to damages because the public would be inclined to think that he had allowed himself to be photographed in this way as an advertisement. (Trib. Civ. Seine, 10 fév. 1905. D. 1905. 2. 389.) But the dominant and more reasonable view in the French law is that, even where the photograph does not suggest anything discreditable or ridiculous, a person has, nevertheless, a legal right to prevent his privacy from being invaded. This subject, however, belongs to the law of responsibility for fault. (See Pouillet, *Prop. Littéraire*, 3rd ed. n. 194; Perreau, E., in Rev. Trim. 1909, p. 506; Sirey, *Table Décennale*, 1901—1910, vo. *Propriété Littéraire*, n. 79; and see, in the English law, a valuable collection of American cases in Wigmore, *Select Cases on the Law of Torts*, I, p. 739. Add Harvard Law Review, 26, p. 275, and 12 Columbia Law Review, 693.) Whatever view may be taken on this question, it is at least clear that the consent of the person to be photographed may be readily implied if he sees that the camera is directed at him and does not seek to get out of the way. So, in France, where a photographer had taken a photograph of a group of acrobats performing in the street, and had reproduced the picture for sale, it was held that they must be considered to have given a tacit consent, inasmuch

as they saw the photograph being taken and made no objection, though their consent to the reproduction might be withdrawn afterwards if they desired to put a stop to it. (Trib. de Paix de Paris, 10 avril 1908, D. 1908, 5, 63; Trib. de Paix de Narbonne, 4 mars 1905, D. 1905, 2, 389.)

Author and publisher.

In this case also many terms are left to be implied. The Swiss *Code des Obligations* has a special chapter on *Le Contrat d'Edition* (arts. 380 *seq.*), but the French and Egyptian codes are silent. If a publisher buys a work from an author is it an implied condition that he will publish the work? May the publisher keep the manuscript for an indefinite time and then publish it? Probably no categorical answer can be given to such questions. The answer depends upon the circumstances of each case. The publisher of a magazine in which a number of short stories appeared every month or every week, might perhaps buy a short story which was offered to him without coming under any implied obligation to publish it at all. The writer might know that it was the custom of publishers of such magazines to buy large numbers of stories or articles to be used when convenient, or even to be left unused in the publishing office. There are some kinds of literary work in which the author receives a price for the product which he sells, without at the same time contemplating that the work will have any effect upon his literary reputation. On the other hand, there are many cases in which the author has as much regard to the effect of the work upon his reputation as to the sum which he receives for it. In a French case the facts were as follows: M. Anatole France, as quite a young man, had sold to a publisher for a small sum a History of France. For thirty years the publisher did nothing with it. Then, when M. Anatole France had become famous, the publisher decided to bring out the old history which had been lying in his desk. M. Anatole France objected to this on the ground that his views had changed, and the publisher offered to print on the title page an announcement that the book had been written thirty years before. But, in an action by M. France to prevent the publication, the court decided that it was contrary to the implied contract between him and the publisher to bring it out after this lapse of time. (*Gazette des Tribunaux*, 30 déc. 1911, v. 86, p. 1055.) In a Canadian case, a publisher had commissioned an author to write an historical

work for him as one volume of a series. The publisher paid the price which he had agreed upon, but as he disapproved of some of the opinions expressed by the writer he did not publish the book. The writer brought an action against him for return of the manuscript in order that he might publish it through another publisher, and it was held by the Supreme Court of Canada that in this case it was an implied term of the contract that the book should be published as well as that the price should be paid for it. If the publisher was not willing to publish the book, the author, on returning the price, could demand the return of the manuscript. (*Lesueur v. Morang Co.*, 1911, 45 Canadian Supreme Court Reports, 95.)

Writer and receiver of a letter.

There has been in the French law much discussion as to the rights of the receiver of a letter, and as to the extent to which these rights depend upon an implied contract between him and the writer of the letter. The rights of the writer and the receiver may be thus summarised:—

(1) It is now generally agreed that, unless there is evidence of a contrary intention, the receiver of a letter becomes the owner of it when it has passed into his hands. A contrary intention may appear from the circumstances. It appears, for example, in the case of letters sent by a principal to his agent on matters concerning the agency. (Valéry, *Contrats par Correspondance*, nos. 145 and 147, and nos. 337—340; Pouillet, *Propriété Littéraire*, 3rd ed. n. 387; Geny, *Lettres Missives*, 1, n. 125; Douai, 28 janv. 1896, D. 96. 2. 521, and note by M. A. Legris; D. N. C. C. 1, p. 948, n. 10; and Additions, 1913, p. 62, *sous Propriété des Lettres Missives*.)

(2) But this ownership of the receiver of a letter is subject to serious limitations. If the letter is of a confidential character—and whether it is so is a question of circumstances—the receiver has no right to divulge its contents. (Pouillet, l.c.; Aubry et Rau, 4th ed. 8, p. 289; Crim. 5 janv. 1906, D. 1908. 1. 49, and the references in the note.)

It is a traditional rule of the French law that the inviolability of private correspondence must be respected. (Note of M. Appert to S. 1899. 4. 9, and note of M. Tissier to Limoges, 12 févr. 1894, S. 1895. 2. 17; Geny, *Lettres Missives*, 1, n. 68; Req. 20 oct. 1908, D. 1909. 1. 46.) The receiver of the letter is relieved from the duty of secrecy if he has to defend himself

against an action brought by the writer of the letter. (Aubry et Rau, 4th ed. 8, p. 290; Larombière, art. 1331, n. 14; D. N. C. C. 1, p. 954, n. 192.)

The receiver may adduce the confidential letter as proof of a contract made with him by the writer. (Same authorities; add Req. 18 mars 1861, D. 61. 1. 432; *dissertation* by M. Legris in D. 1901. 2. 89.) And he may adduce the letter also in order to clear his character from an aspersion upon it made by the writer. (Req. 3 févr. 1873, D. 73. 1. 467; Limoges, 12 févr. 1894, D. 95. 2. 537, and *dissertation* by M. Valéry.)

As M. Appert expresses it: *Personne ne refuserait à l'homme attaqué dans sa vie le droit de saisir, pour se défendre, l'arme que lui a prêtée préalablement son adversaire. Pourquoi l'homme attaqué dans son honneur ne chercherait-il pas dans la correspondance de son agresseur la preuve que ces attaques sont calomnieuses?* (Note to Haute Cour de Justice d'Angleterre, 27 nov. 1897, S. 1899. 4. 10. col. 2.) The details belong to the law of evidence. (See D. N. C. C. 1, p. 954, nos. 180 *seq.* Cf. C. A. Alex. 9 mai 1889, B. L. J. 1, 264; C. A. Alex. 10 févr. 1892, B. L. J. IV. 134.)

(3) Although the receiver of the letter is the owner of it as a material object, he has not, apart from agreement, the literary property in it. Regarded from the point of view of literary property it belongs to the writer and not to the receiver, and it is the writer only who can publish it. (Pouillet, *Propriété Littéraire*, 3rd ed. n. 387; Geny, *Lettres Missives*, 1, n. 140; Paris, 21 févr. 1901 (Brunetière c. Yves Guyot), *Pand. Franç. périodiques*, 1901. 2. 268; D. N. C. C. 1, p. 953, nos. 154 *seq.*)

Are these rules of law to be explained by implied contract?

The rules above stated are usually explained as resulting from an implied contract between the writer of the letter and the receiver. The writer has voluntarily parted with the property in the letter, but subject to the implied conditions that the receiver will respect its confidential nature and that he will not infringe the author's right to make a literary use of it. Thus M. Legris says of the confidentiality: "*Le caractère confidentiel entraîne pour le destinataire l'obligation de ne pas divulguer la teneur de la correspondance. C'est qu'entre l'auteur et le destinataire d'une lettre confidentielle il se forme un pacte tacite qui ne peut être rompu que par la volonté réciproque de ceux qui l'ont formé.*"

(Note to Douai, 28 janv. 1896, D. 96. 2. 522. col. 1. Cf. Dall. *Supp.* vo. *Lettre Missive*, n. 8; *Pand. Franç.* vo. *Lettres Missives*, nos. 131—141; Pouillet, *Propriété Littéraire*, 3rd ed. n. 387; Note of M. Appert to S. 1899. 4. 9; Rouen, 23 mars 1864, D. 64. 2. 70.)

It must, however, be admitted that this theory is, in many cases at any rate, highly artificial.

There are, no doubt, circumstances from which a court may in some cases infer that the receiver of a letter has given an implied consent to the conditions imposed by the writer. This might be so, for instance, in the case of a letter by a trader to one of his agents or employees as to a matter of business. And in other cases when there has been an interchange of letters and confidences have been mutually invited and exchanged, the court might be able to spell out a contract that these confidences were to be respected.

But cases are easily conceived where it is impossible to discover evidence of any such implied contract. The intention of the writer of the letter to impose conditions may be clear enough, but there is nothing to show that the receiver agreed to be bound by them. The man who receives a letter does not know what is in it until he opens it, and when he has opened it it is too late to refuse it. But this does not imply that he agrees to be bound by what is in the letter. Such a theory is fantastical, as M. Geny says. (Geny, *Lettres Missives*, 1, n. 74. Cf. Valéry in note to D. 95. 2. 537.) Moreover, if the writer's claim to protection depends upon implied contract, he will have no right against any person except the receiver of the letter or his *ayant cause*. Against a third party into whose hands the letter has fallen he will be without any protection.

But if we are to discard in this case the theory of implied contract, upon what principle can the inviolability of correspondence be supported? Two theories have been suggested:—

(1) According to M. Valéry, in principle, the receiver of a letter being its owner may make any use he likes of it unless there is evidence of a contract to the contrary or unless the use made of the letters amounts to a delict or a quasi-delict, as, for example, when it is made for the purpose of making a profit or of injuring the reputation of the writer. The breach of confidence is not a wrong in itself. (Note to Limoges, 12 févr. 1894, D. 95. 2. 537.)

(2) According to M. Geny, the breach of confidence is a wrong in itself; it is the infringement of a right to secrecy which rests upon considerations of public order. The writer of a confidential letter has a legal right against all the world to count on the secrecy being preserved. The *droit au secret* is one of those rights of personality—those *biens innés*—which are recognised by the general law. (*Lettres Missives*, 1, n. 75. See, as to rights of personality in general, Aubry et Rau, 5th ed. 2, p. 2; Perreau, E. H. in *Rev. Trim.* 1909, p. 501.) This theory has been adopted in several French cases. *Attendu que le secret des correspondances privées, consacré par une jurisprudence constante, est un principe qui touche à l'ordre public et ne pourrait être violé sans porter une grave atteinte aux relations et aux habitudes sociales.* (Nancy, 14 mai 1890, D. 91. 2. 266, and cases cited by M. Geny, op. cit. 1, n. 75.)

I prefer the second theory, and it is supported by the analogy of the English law.

Comparison with the English law.

In the English law it is clearly settled that, apart from special limitations, the receiver of a letter has the property in it, but not the copyright.

The writer of a private letter does not need to rely upon the special legislation to protect literary property. He can apply to the court to restrain the publication as a breach of confidence unless there are special circumstances, such as where the publication is necessary for the purpose of clearing the defendant's character. (*Labouchere v. Hess*, 1897, 77 L. T. 559, Mews' Dig. 8, p. 1971. See the report of this case with a valuable note by M. Appert upon the comparison with the French law, in S. 1899. 4. 9; Copinger on *Copyright*, 5th ed. 45.)

The general principles are thus formulated in a recent case: "The recipient or possessor of letters is not entitled to publish them, nor paraphrases thereof, nor extracts therefrom, and, if they are written in confidence, he is not entitled to communicate their contents to third persons. But, subject to those exceptions, the lawful possession of a letter confers all the rights incident to property. Accordingly, a person lawfully in possession of letters may make use of the information contained in them for the purpose of writing a biography without any express or implied authority from the writer. *The right to use a letter does not depend*

upon the intention of the writer. (*Philip v. Pennell*, 1907, 2 Ch. 577, 76 L. J. Ch. 663. See Copinger on *Copyright*, 5th ed. p. 44; Halsbury, *Laws of England*, vo. *Copyright*, 8, p. 138.)

In the English law this subject is commonly dealt with not by writers on Torts, but by writers on Copyright.

But it is entirely immaterial that the letters possess no literary value. (*Walter v. Lane*, 1900, A. C. 539, 69 L. J. Ch. 699.) And the true principle is that the publication is restrained on the ground of violation of confidence and injury to the feelings. (*Story, Equity*, 2, s. 946; *Cooley, Torts*, 3rd ed. 2, p. 719.)

Right of lecturer to restrain publication of lecture.

It has sometimes been suggested that a professor, being paid to deliver lectures, abandons when he delivers his lecture his rights of literary property, so that he cannot prevent a student from taking down complete notes and publishing them in the form of a book. But the French law is settled to the contrary, and for excellent reasons. It is not necessary to invoke the theory of implied contract, though it would be entirely reasonable to say that the students who attend a course of lectures do so on the implied condition that they will not publish the notes which they take.

It is, however, sufficient to say that the lecturer retains the literary property in the lectures. *Les cours et leçons d'un professeur constituent une propriété littéraire protégée par la loi du 17 juill. 1793. En conséquence, constitue une contrefaçon le fait de publier et mettre en vente, sans le consentement de l'auteur, la sténographie des leçons professées dans un cours public ou privé.* (Trib. de la Seine, 17 mars 1905, S. 1905. 2. 253. See Pouillet, *Propriété Littéraire*, 3rd ed. n. 58; Sirey, *Table Décennale*, 1901—1910, vo. *Propriété Littéraire*, n. 14, for list of authorities.)

Comparison with the English law.

In England the law is the same and it has been rested to some extent upon implied contract.

If a speech or a lecture is delivered not to the public in general, but to a limited class of persons, such as the students of a university, there may be an express or implied obligation on the part of those who hear the speech or lecture not to publish it. (*Nicols v. Pitman*, 1884, 26 Ch. D. 374, 53 L. J. Ch. 552; *Caird v.*

Sime, 1887, 12 App. Ca. 326, 57 L. J. P. C. 2; Copinger on *Copyright*, 5th ed. p. 48.)

It has been argued that in the case of a university professor, and the same argument would apply to a lecturer in a government institution, there is no contract between the student and the lecturer. The contract is between the lecturer and the university on the one hand, and between the student and the university on the other.

This is true, but the answer is that the lecturer does not contract to give his lecture to the public, but only to the limited class, and that the student contracts with the university to attend the lectures subject to the restrictions contained in the contract between the professor and the university. (See *Caird v. Sime*, *ut sup.*)

The literary property of a *public* lecturer is in England now protected by the Copyright Act, 1911, s. 35, subject to conditions which do not need to be stated here. (Copinger on *Copyright*, 5th ed. p. 47.)

Rule 6.

All the clauses of a contract are interpreted the one by the other, giving to each the meaning derived from the entire document. (C. C. F. 1161; C. C. Q. 1018.) The court must look at the contract as a whole, which was what the parties did themselves, and discover the general intention. This will frequently be the best guide in construing the ambiguous language of particular clauses. The clauses must be read so as to make them all harmonise together, if this can be done without putting too violent a strain upon the words. For each clause was not intended by the parties to be a distinct contract, but all the clauses together were to form one contract. In order to arrive at the common intention it is necessary to study the general scheme of the contract, to compare one clause with another, to inquire into the considerations which the contracting parties had in view, and to decide whether the interpretation suggested by one or other of the parties can be justified by the logical and reasonable consequences to which it would lead. (Paris, 13 févr. 1894, D. 94. 2. 430.) If upon the first examination there appears to be some inconsistency between two of the clauses, the court must attempt to find a means of reconciling them by a study of the contract as a whole. It should not be admitted too easily that there is an irreconcilable contradiction. The parties meant both clauses to receive effect, and if, by putting a particular interpretation upon one of the

clauses, even although this interpretation may not be the most obvious one, effect can be given to both, this interpretation is to be preferred to one which would involve striking one clause out of the deed altogether. (Laurent, 16, n. 510; B.-L. et Barde, 1, n. 567. See Bruxelles, 10 mars 1864, Pasierisic Belge, 64. 2. 192; C. A. Alex. 22 déc. 1898, B. L. J. XI, 60; C. A. Alex. 17 mai 1900, B. L. J. XII, 262.) This principle that the different clauses of a contract must be read together is illustrated also in the cases in which the contract is contained in several instruments. Where the parties execute on the same day two deeds in relation to the same subject the court may come to the conclusion that the two deeds were intended to be correlative and to constitute one contract only. And if satisfied upon this point, the court must try to reconcile inconsistencies in the two writings, and to give effect to the general intention as collected from both taken together. (D. *Rép. Oblig.* n. 869.) In English law, also, the court may find that the contract is contained in several writings. (*Oliver v. Hunting*, 1890, 44 Ch. D. 205, 59 L. J. Ch. 255; Leake, *Contracts*, 6th ed. 116; Pollock, *Contracts*, 8th ed. p. 171.) The intention of the parties in a case of this kind, where they execute two writings, is generally to conceal from the public their true intention. One of the writings is to be shown and the other is to be concealed. For instance, a price is stated in one of the writings, but it is explained in the other writing that this price is not the real one. Or, the parties execute a deed of sale which is absolute on its face, but at the same time they make a *contre-lettre* that the buyer is to hold the property as security. The French Code contains a special provision that these *contre-lettres* are not to be allowed to prejudice the rights of third parties. (C. C. F. 1321.) This subject will be discussed later in explaining the effects of simulation. (*Infra*, 2, p. 129.) The rule that to get at the intention of the parties we must take all the clauses together, and, if possible, give effect to them all, applies also where a postscript is added to the original contract. The postscript will be interpreted as not abrogating the contract except to the extent to which it is incompatible with it. The presumption is that it is to be read as a part of the contract. But although all the clauses in a contract are to be read together, and harmonised if possible, cases occur in which there is an absolute and irreconcilable contradiction between two clauses. In such a case what is the duty of the courts? Must the whole contract be declared inoperative because it is impossible to give it an intelli-

gible meaning? Here everything is left to the discretion of the court. It may appear that the parties intended the validity of each of the clauses to be dependent on that of the others, so that if one of the clauses has to fall because it is inconsistent with another, the whole contract must likewise fall with it. (B.-L. et Barde, 1, n. 566.) But this is not always the case. It may appear that one of the clauses which is irreconcilable with another, or with the scheme of the whole deed, was inserted by mistake or without sufficient consideration. And if the court is satisfied that the clause which causes the difficulty does not really express the intention of the parties the court may disregard this clause altogether. (B.-L. et Barde, 1, n. 568.) As English judges express the same rule, "Insensible words may be rejected." (See *per* Willes, C. J., in *Smith v. Packhurst*, 1741, 3 Atk. at p. 136; Halsbury, *Laws of England*, vo. *Deeds*, p. 455.) It is only in an extreme case that so violent a method of interpretation can be adopted, but cases undoubtedly occur in which it leads to the right solution.

Rule 7.

In cases of doubt, the contract is interpreted against him who has stipulated and in favour of him who has contracted the obligation. (C. C. F. 1162; C. C. Q. 1019; C. C. E. 140/201.) The Egyptian Code gives the rule more shortly, and with equal clearness. *In cases of doubt the construction shall be in favour of the party who incurs the obligation.* There is a presumption in favour of freedom. No one is legally bound by a contract unless he has chosen to limit his freedom in this way. And if the contract is ambiguous he will be presumed to have limited his freedom less rather than more. As Domat puts it, *Celui qui s'oblige ne veut que le moins.* (*Lois Civiles*, Ire. partie, Liv. I. Tit. I, sec. 2, no. 13.) Moreover, the party claiming that another has limited his freedom has the *onus* of proof, and the moment there is any doubt as to whether the debtor is bound to a less or to a greater extent, the creditor must prove that it is to the greater extent if he is to succeed. (C. C. E. 214/278; C. C. F. 1315; C. C. Q. 1203.) There are many cases in which the courts are obliged to put their judgment upon this ground. (Conseil d'Etat, 2 juill. 1875, D. 76. 5. 453; Douai, 10 nov. 1898, D. 1900. 2. 47; C. A. Alex. 17 mai 1900, B. L. J. XII, 262; C. A. Alex. 6 juin 1901, B. L. J. XIII, 362; C. A. Alex. 20 nov. 1902, B. L. J. XV, 11.)

It is really a mistake, however, to call this a rule of interpretation. If it is possible by applying the proper rules of construction to discover the intention of the parties, effect will be given to that intention; if it cannot be discovered there is no obligation. Demolombe says: "It is interpretation confessing itself impotent before the impenetrable obscurity of the contract." (v. 25, n. 23.) It is cutting the knot when it cannot be untied, and is only to be employed as a last resort. (B.-L. et Barde, 1, n. 571.) It is at any rate better than to allow the litigant who draws the shorter of two straws to win the suit, a method for which there is an old French precedent. (Demolombe, 25, n. 24.) In synallagmatic contracts, in which each of the parties is alternately debtor and creditor, the rule under consideration will apply now to the one and now to the other party according to the *rôle* which he is playing. For example, if you claim that I am your debtor, the rule is against you until you have established the debt. But if you succeed in this, and I claim in reply that under another clause of the contract you have restricted your ordinary right to claim performance, the rule is then against me. (Demolombe, l.c.) In the case of sale the French Code has a special provision that "Every obscure or ambiguous clause is to be interpreted against the seller." (C. C. F. 1602.) For it is the seller who fixes the price at which he will sell, and as he knows the thing which he is selling better than the buyer does, it is for him to make the conditions clear. If there is any obscurity it is his fault rather than that of the buyer. *Qui vend le pot dit le mot*, says Loysel, adding that there are more foolish buyers than foolish sellers. (*Institutes Coutumières*, Liv. III. Tit. IV, n. 1.) This article of the code has been the subject of much difference of opinion, and the Egyptian legislator has done well to omit it. It is no doubt the case that, as a general rule, the seller states the terms of the contract. It may be that he draws up the document and presents it to the other party to sign. And so long as the clauses are clauses dictated by the seller and for his protection, it is natural that every doubt should be interpreted favourably to the other party. But if, as is often the case, the contract contains clauses put in by the buyer for his protection, why should they be interpreted against the seller? Accordingly it is generally agreed that in regard to such clauses doubts are to be resolved in favour of the seller and not against him. (B.-L. et Barde, 1, n. 572: Hue, 10, n. 71.) Further, does this article, applicable to sale, state an exceptional rule which is not to be extended by analogy to

other contracts, even to such a contract as lease, which so closely resembles sale? Most writers say that the rule, being an exception, cannot be extended by analogy. (B.-L. et Barde, 1, n. 572; B.-L. et Saignat, *Vente*, n. 284, and n. 998; D. N. C. C. art. 1162, n. 16.) But the answer to this appears to be clear. The article properly understood does not lay down any exception. If in a contract of sale it is only the clauses in which the buyer binds himself which are to be interpreted restrictively and against the seller, the article only states what is the general rule of law, and is in fact superfluous. The matter is covered by article 1162, corresponding to C. C. E. 140/201, which we are at present discussing. Even though the French Code did not contain article 1602, the law would not be any different. (B.-L. et Wahl, *Louage*, 3rd ed. 1, n. 47; D. *Rép. Louage*, n. 147.) And there are decisions by the French courts that in a contract of lease if there is obscurity the doubt should be resolved in favour of the lessee. It is the lessor who may be looked upon as the stipulator, and it is he, who like the vendor in the contract of sale, offers the property to the other, and, if they come to an agreement, he prepares as a general rule the document in which this agreement is expressed. The maxim of the Roman law on which our article is founded is *verba contra stipulatorem interpretanda sunt*. (Dig. 45. 1. 38. 18.) I prefer the view followed by the French courts in these cases. In Quebec the French jurisprudence has been followed in holding that in a lease doubts must be solved against the lessor. (*Watson v. Sparrow*, 1899, R. J. Q. 16 S. C. 459.) The same question may arise in the case of an exchange. If there is a doubt as to the extent of something promised by one of the parties to the exchange, it seems to me that it should be resolved in favour of the lesser liability, upon the general rule that the construction shall be in favour of the party who incurs the obligation. In the Egyptian law this conclusion is clearly right, as we are not embarrassed by an article corresponding to C. C. F. 1602. So when there are two supposedly duplicate copies of the same agreement, the copy which imposes the less onerous terms on the debtor will be accepted *in dubio* in preference to the other. If there are two copies of a lease, and the copy in possession of the tenant does not stipulate that any special business shall be carried on in the rented premises, whereas the copy in the hands of the landlord says the premises shall be used for a particular business, the tenant's copy will be preferred. A good illustration of the general rule of the interpretation against the stipulator is afforded

by a recent French case. A bill of lading contained a clause that the goods were to be delivered "as quickly as possible and without interruption during all the hours for which the customs authorities gave permission." The shipowners wished to discharge the goods during the night. The consignees maintained they were not bound to take delivery during the night. When this was intended it was usual to say expressly "day and night." The Court of Douai held that the clause being obscure, must be interpreted against the stipulator, and, therefore, it upheld the contention of the consignees. The clause under which the delivery was to be effected so quickly was plainly inserted in the interest of the shipowner, and in order that the ship might get away as soon as possible. The shipowner was, as regards this clause, the stipulator, and the doubt was accordingly interpreted against him. (Douai, 10 nov. 1898, D. 1900. 2. 47.) Sometimes the rule that, where the contract is ambiguous, the presumption is that the party bound himself less rather than more comes in conflict with another rule of interpretation, which, although not laid down in the codes, is recognised in practice. This is, that where a party to a contract undertakes a general liability, but declares that he is to be relieved from this liability in certain special cases, the clause containing the exceptions or exemptions will be interpreted restrictively against him. And the same rule applies where a party who is subject to a general liability by the law stipulates for immunity from this liability in certain cases. As an example of the first case may be given the contract of carriage.

It is a well settled rule that when the carrier by the contract exempts himself from liability for loss from certain causes, these exceptions will be narrowly construed. He is not to be excused unless he has bargained in clear terms for his exemption. (See Cass. 19 févr. 1900, D. 1900. 1. 433.) In England the courts are very strict in interpreting such clauses of exemption. For example, where the clause exempted the shipowner from liability for loss by "thieves" it was held that this did not cover thefts by persons on board, but meant only persons who got into the vessel from outside. (*Taylor v. Liverpool and G. W. S. S. Coy.*, 1874, L. R. 9 Q. B. 550, 43 L. J. Q. B. 205.) And in a later case where the shipowner, apparently having this decision in view, had tried to protect himself further by stipulating in the bill of lading that he would not be liable for loss by "thieves whether on board or not," it was held that this was not wide enough to include members of the crew. (*Steinman v. Angier Line*, 1891, 1 Q. B.

619, 60 L. J. Q. B. 425. See Carver, *Carriage of Goods by Sea*, 5th ed. s. 77, and s. 94.) In regard to the contract of insurance there has been in the French law considerable hesitation as to the right rule of interpretation. According to a number of old decisions, obscure or ambiguous clauses in an insurance policy are to be interpreted against the company, for it is the fault of the company if the policy contains any obscurity. (Paris, 1 août 1844, D. 45. 2. 7; B.-L. et Barde, 1, n. 573.) But this seems to be going too far, and the tendency of the French jurisprudence is now to hold that there is no general rule that an insurance policy must be interpreted against the insurer. (D. *Supp.* vo. *Droit Maritime*, n. 1660; Cass. 27 août 1878, D. 79. 1. 456.) But here, as in other contracts, clauses restricting or limiting the liability of either party will be narrowly interpreted. Beyond this it is not reasonable to go. If there is a reasonable doubt as to whether the company intended to insure a certain risk, there is no ground for denying them the benefit of the ordinary rule. On the other hand, if they undertake to insure a certain person or certain property, but declare that they are to be relieved from liability in particular circumstances, the clause of exemption will be narrowly regarded. (See Bordeaux, 24 mars 1896, D. 1897. 2. 236; Lefort, *Assurance sur la Vie*, 1, p. 331.) The second case, which seems to conflict with the rule that a party is presumed to bind himself less rather than more, is that of exemption from legal liability by a special stipulation. In the cases in which such stipulations of immunity are permitted it is certain that they will be narrowly interpreted. This subject belongs, however, to another place. (See *infra*, 2, pp. 261 *seq.*)

Rule 8.

However general the terms may be in which the contract is expressed they extend only to the things concerning which it appears that the parties intended to contract. (C. C. F. 1163; C. C. Q. 1020.) This rule is itself merely an application of the general principle that it is the intention of the parties to which effect must be given, and not the literal terms which they employ. The parties may use some general expression, but may show by something in the rest of the deed or by its whole character that they do not intend this general expression to be taken in its widest sense. We have always to bear in mind what it was of which the parties were thinking. A common application of this rule is in

regard to a compromise of a dispute in order to prevent an action. In this case the Egyptian Code specially says: *The terms of the renunciation which is the result of a compromise must be interpreted most strictly, and, whatever be its terms, the renunciation applies to those rights only which form the precise object of the matter upon which the compromise is entered into.* (C. C. E. 534/656.) This is in accordance with the traditional rule of the French law. (C. C. F. 2049; Laurent, 28, n. 388; Guillaouard, *Transactions*, n. 120.) To take Pothier's illustration: if you and I settle our respective claims by a compromise, and it is agreed that I am to take a certain sum "in satisfaction of all my claims;" that means only all the claims of which I was aware. It does not affect claims of which I had no knowledge. For example, a compromise of my rights under a will which is disputed will not bar me from claiming a legacy under a codicil which has come to light only after the compromise was made. (*Oblig.* n. 98.)

The French jurisprudence has applied the principle frequently in cases about the transfers of literary rights. The transfer of copyrights or the right of reproducing works of art may be made in very general terms, but, however wide they may be, they will only carry the rights given by the law at the time. If a copyright should be extended by a subsequent law the rights for the new period will not, in the absence of express stipulation, be held to have been included in the transfer. (Cass. 28 mai 1875, D. 75. 1. 334; Paris, 18 août 1879, D. 81. 2. 61; B.-L. et Barde, 1. n. 575.) But the rule does not mean that when parties are dealing about an object which comprises a number of particular things they are understood to be referring only to such particular things as were known to them. When the object of the agreement is a universality, it comprises all the particular things which compose the universality, even those of which the parties had no knowledge. For the parties intend to deal with the thing as a whole. If I compromise with you for a sum of money instead of a share in a succession which has fallen to me, or sell you my stock-in-trade, or my library, or my furniture at a certain price, I cannot get the contract annulled on the ground that the succession, or the stock, or the library, or the furniture, as the case may be, comprises articles which I did not know about. The presumption at any rate is that I agreed to take a lump sum for my rights *en bloc*. This, of course, will not be so when the parties show that they intend the universality to include only certain things which they knew of and identify; as, for example, by saying that

they are described in an inventory. (Pothier, *Oblig.* n. 99.) And, no doubt, there are cases in which, although the parties are dealing with a universality, the presumption that they intend to deal with all the things therein comprised may be rebutted. If I sell you my furniture and you discover afterwards a diamond ring in a secret drawer of an old desk, I shall not be considered as having intended to include this in the sale. (Paris, 27 avril 1868, D. 68. 1. 141.)

Illustrations from English law and law of Quebec.

In an English case an owner of land granted a lease of it for 99 years to a gas company with power to excavate and to erect a gasometer. In the excavation a very ancient boat was discovered. It was held that the implied license to remove and dispose of the soil arising from the excavation did not extend to the boat, the existence of which was not in contemplation of either party. (*Elwes v. Brigg Gas Co., Ltd.*, 1886, 33 Ch. D. 562, 55 L. J. Ch. 734.)

The general rule is well illustrated by a recent case in Quebec. A donation was made by a wife to her husband in a marriage contract, giving to him, in the event of her predecease, *tous les meubles et effets mobiliers qui pourront lui appartenir au jour de son décès*. At her death she had a sum of money in the bank. The husband claimed this sum as comprised in the general expression *tous les meubles et effets mobiliers*, and the bank paid it to him. Subsequently, one of the heirs *ab intestato* of the wife sued the bank for payment of his share of this sum, and contended that the payment to the husband was a bad payment, on the ground that the words *meubles et effets mobiliers*, general as they were, did not include the money in the bank. It was true that at the time of the marriage the wife had money in the bank, and had also furniture, carriages, etc. A list of these moveables was annexed to the contract, and this list did not mention the money in the bank. In the whole circumstances the court came to the conclusion that the general words *meubles et effets mobiliers*, which would naturally include such property as money in the bank, were not intended in this particular contract to have so wide a connotation. (*Sabourin v. Banque d'épargne*, 1903, R. J. Q. 12 K. B. 380.)

Rule 9.

When the parties in order to avoid a doubt whether a particular case comes within the scope of a contract, have made special provisions for such case, the general terms of the contract are not on this account restricted to the single case specified. (C. C. F. 1164; C. C. Q. 1021.)

It is very common for people to specify particular points which are really covered by the general words, and the presumption is that in so doing they do not intend to limit the generality, but only to prevent the possibility of doubt. It is impossible to lay down any general rule as to whether the mention of a particular thing is meant to be restrictive or not, but the argument *a contrario* is a very dangerous one, and the maxim *expressio* (or *enumeratio*) *unius est exclusio alterius* is more often misleading than helpful. (Demolombe, 25, n. 23; Laurent, 16, n. 513. See for some English illustrations of the caution necessary in applying this maxim, Broom's *Legal Maxims*, 7th ed. p. 493; Trayner's *Legal Maxims*, 4th ed. p. 186. Cf. *Att.-Gen. for Ontario v. Att.-Gen. for Quebec*, 1910, A. C. 627, 80 L. J. P. C. 35.)

Pothier's illustration is a provision in a marriage contract that the consorts shall be in community and that moveable successions accruing to either of them shall fall into the community. Does this clause prevent all other things falling into the community which so fall by the general law, as, for instance, moveables which come to one of the consorts by gift? Presumably not. The clause is added only to remove a doubt, which the parties, being unlearned, entertain as to whether moveable successions did fall into the community. (*Oblig.* n. 100.) Notwithstanding, there are without doubt many cases in which the mention of the particular thing is only reasonably to be explained as intending to exclude other things. For instance, in a mortgage which covered certain iron foundries, and also two dwelling-houses, it was said that the security should cover "all grates, boilers, bells, and other fixtures in and about the said two dwelling-houses." It was held that this excluded the fixtures in the foundries, though, if nothing had been said about them, these fixtures also would have been covered by the mortgage. (*Hare v. Horton*, 1833, 5 B. & A. 715, 39 R. R. 633.) And in warranties which are restrictively construed, the mention of one thing will generally exclude another. (See *Budd v. Fairmaner*, 1831, 8 Bing. 48, 34 R. R. 619.)

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